No. 80-6843

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOSE MARTINEZ HIGH,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

I. Whether the Georgia Supreme Court's holding in petitioner's case that a finding of "serious physical abuse" can be sustained solely upon evidence of mental anguish in anticipation of physical harm under Georgia Code Ann. §27-2534.1(b)(7) is in conflict with this Court's decision in Godfrey v. Georgia, 446 U.S. 420 (1980)?

II. Where the sentence of death is imposed solely upon Georgia Code Ann. §27-2534.1(b)(7), did the failure of the Supreme Court of Georgia to remand the case for a new sentencing hearing for the jury to be instructed according to the clear and objective criteria of Godfrey v. Georgia, 446 U.S. 420 (1980) violate the Eighth and Fourteenth Amendments?

III. Whether the infliction of the death penalty on a child who was under the age of eighteen at the time of the crime constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments?

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No. _____

IN THE

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JOSE MARTINEZ HIGH,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

Petitioner, Jose Martinez High, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia is reported in High v. State, ___ Ga. ___, 276 S.E. 2d 5 (1980), and is appended hereto at 1a.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on February 24, 1981. A timely motion for rehearing was

denied on March 13, 1981. On April 28, 1981, Mr. Justice Powell issued an order granting petitioner to and including June 11, 1981, to file this petition. Jurisdiction of this court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and intending to here assert deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> ...nor cruel and unusual punishments inflicted;

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> No state shall...deprive any person of life, liberty, or property, without due process of law.

2. This case also involves Ga. Code Ann. §27-2534 1(b), which provides in part:

> In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:
>
> * * *
>
> (2) The offense of murder...was committed while the offender was engaged in the commission of another capital felony, or aggravated battery...
>
> (7) The offense of murder....was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

and Ga. Code Ann. §27-2537, which provides in part:

> (a) Whenever the death penalty is imposed,... the sentence shall be reviewed on the record by the Supreme Court of Georgia...
>
> * * *

(c) With regard to the sentence, the court shall determine:

* * *

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

STATEMENT OF THE CASE

Petitioner seeks a writ of certiorari from this Court to the Supreme Court of Georgia to review a decision of that court upholding his conviction and sentence of death.

Petitioner, age seventeen [1] at the time of the offenses of which he was convicted, is a black male convicted of murder and kidnapping of another child, Bonnie Bulloch, age 10, of the kidnapping, armed robbery, and aggravated assault of another person, Henry Lee Phillips, kidnapped during the same incident, and of possession of a firearm in the commission of a felony. The jury recommended sentences of death for the crimes of murder, the two kidnappings, and the armed robbery solely upon finding the existence of statutory aggravating circumstance, Ga. Code Ann. §27-2534.1(b)(7).

The offenses occurred in the late evening of July 26, 1976, when the victims were abducted by three persons from a service station where the older victim, step-father of the murdered boy, worked. Petitioner was identified as one of the three persons involved in these offenses. After the robbery, the perpetrators drove the two victims to a secluded area and shot them. The step-father recovered but the boy did not.

At trial the state presented evidence that late on

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[1] The Report of the Trial Judge states that petitioner was born on August 17, 1959, which would have made petitioner sixteen years, eleven months and ten days old at the time of the crime. Both petitioner and the records clerk at the Georgia Diagnostic Center, where petitioner is now incarcerated, indicate that his birthdate was August 17, 1958, making him seventeen years, eleven months and ten days old at the time of the crime.

July 26, 1976, a car with three occupants pulled into the service station where Henry Phillips worked. The three men got out of the car and petitioner, identified as one of the three, robbed Phillips at gunpoint. Tr. 373-376. Mr. Phillips testified that he was then ordered into the robbers' car trunk, tr. 376-377, and soon found himself in the woods along with his step-son, Bonnie Bulloch. Both were ordered to lie on the ground, shots were fired, and when Mr. Phillips regained consciousness the boy was dead. Tr. 379-383.

The body of Bonnie Bulloch was found one mile from Sharon, Georgia. Tr. 544-545. An autopsy revealed two bullet wounds, a 32 caliber bullet wound in the back of the head which penetrated the brain causing death, and a wound in the fleshy part of the ear. Tr. 700-702. Several incriminating statements made by petitioner to the police were also introduced into evidence. Tr. 607-610, 773-775, 784-786. One such statement related that the boy begged for his life as he was being taken from the service station to the site of the murder. Tr. 609.

The jury returned verdicts of guilty as to all six offenses. Following the verdict a sentencing hearing was held although neither the state nor petitioner produced any further evidence.

The jury was instructed orally and in writing that it could impose the death penalty if it found one of two statutory aggravating circumstances under Ga. Code Ann. §27-2534.1 (1978). The jury was instructed under §(b)(2) of that statute that it could impose death if it found that the offenses were "committed while the offender was engaged in the commission of another capital felony, or aggravated battery." As to §(b)(7), the jury was charged that it could impose death if the offenses were "outrageously or wantonly vile, horrible,

or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Tr. 928, App. at 14a.

The prosecutor, in his closing argument, made several passing references to the applicability of §(b)(7) to the facts of petitioner's case by stating, "[Y]ou're not dealing with a human being . . . you're dealing with a depraved mind." Tr. 835. He commented that the victim begged for his life, tr. 822, and he also noted that the victim "didn't suffer but just from the ride." Tr. 830.

The jury returned sentences of death on all four counts submitted to them on the basis of the existence of statutory aggravating circumstance §(b)(7). The jury failed to find aggravating circumstance §(b)(2). App. at 25a.

On appeal the Georgia Supreme Court vacated two of the four death sentences, those being the armed robbery and kidnapping of the victim who was not murdered. High v. State, ___Ga.___, 276 S.E.2d 5, 14 (1981), App. at 10a. The Court upheld the jury's §(b)(7) finding on the theory that "evidence of psychological abuse by the defendant to the victim before death where it is shown to have resulted in severe mental anguish to the victim in anticipation of physical harm may amount to serious physical abuse (i.e. torture to the victim) and will support a finding of depravity of mind of the defendant." Id. at 13.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The questions raised in this petition were not expressly raised in petitioner's trial or in his brief on direct appeal to the Supreme Court of Georgia. Nevertheless, they were sufficiently raised and considered in the Supreme Court of Georgia to sustain this Court's jurisdiction.

At petitioner's trial, prior to the this Court's

decision in Godfrey v. Georgia, 446 U.S. 420 (1980), petitioner filed a Motion Challenging The Constitutionality of Georgia Code §27-2534.1, App. at 26a. In petitioner's brief to the Supreme Court of Georgia on direct appeal one enumeration of error alleged that the death sentences were imposed in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Both the pre-trial motion and this enumeration of error were overruled. High, supra, 276 S.E.2d at 12, App. at 8a.

Further, pursuant to Ga. Code Ann. §27-2537, the Georgia Supreme Court is expressly required to ascertain whether "the evidence supports the jury's . . . finding of a statutory aggravating circumstance." §27-2537(c)(2). In its sentence review the Georgia Supreme Court stated:

> We find the evidence factually substantiates and supports the finding of this aggravating circumstance and the sentences of death by a rational trier of fact beyond a reasonble doubt.
>
> High, supra, 276 S.E.2d at 14 , App. at 10a.

As to the third question presented, whether it is cruel and unusual punishment for a child under the age of eighteen at the time of the crime to be sentenced to death, the Supreme Court of Georgia was required by statute to determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." §27-2537(c)(3) (emphasis supplied). This the Georgia Court did by finding:

> Jose High's sentence to death for kidnapping with bodily injury in which the victim was murdered and murder is not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant.
>
> High, supra, 276 S.E. at 14 , App. at 10a.

REASONS FOR GRANTING THE WRIT

I. THE GEORGIA SUPREME COURT'S HOLDING THAT A FINDING OF "SERIOUS PHYSICAL ABUSE" CAN BE SUSTAINED SOLELY UPON EVIDENCE OF MENTAL ANGUISH IN ANTICIPATION OF PHYSICAL HARM UNDER GA. CODE ANN. §27-2534.1(b)(7) IS IN CONFLICT WITH THIS COURT'S DECISION IN GODFREY v. GEORGIA, 446 U.S. 420 (1980).

The Supreme Court of Georgia upheld petitioner's death sentence pursuant to aggravating circumstance §27-2534.1(b)(7)[2] of the Georgia Code Ann. by finding that this murder and kidnapping with bodily injury was outrageously or wantonly vile, horrible, or inhuman due to the "serious psychological abuse by the appellant to the victim before death." High, 276 S.E.2d at 13, App. at 9a.

In sustaining the §(b)(7) jury finding, the Court apparently relied upon the following as evidence of serious psychological abuse:[3]

> The appellant in his statement said that he thought the boy was too young, but he kept asking him as they rode [to the murder spot], "Are you ready to die? Do you want to die? Well, you're going to die." He stated that the boy was begging for his life. Once the three robbers reached a rural area, the victims were removed from the car, marched around to the front of the automobile and forced to lie on their faces. They were then shot in the head in a coldblooded execution fashion.
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> High, 276 S.E.2d at 13, App. at 9a.

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[2] The jury was also instructed with regard to aggravating circumstance Ga. Code Ann. §27-2534.1(b)(2). The jury failed to find the existence of the (b)(2) circumstance. See App. at 11a - 25a.

[3] In the Report of the Trial Judge, the court noted: (1) the existence of statutory aggravating circumstance §(b)(7), App. at 30a, (2) the existence of "non-statutory aggravating circumstances," to wit: the "elimination or attempt to eliminate the only witnesses" and "tantalizing or taunting the boy before execution," App. at 30a, and (3) in response to the question of whether the victim was physically harmed or tortured, "[m]ental and [s]everal gunshot wounds to the body." App. at 31a.

This case was reviewed by the Georgia Supreme Court subsequent to this Court's opinion in Godfrey. The Georgia Supreme Court, however, ignored the teaching of the plurality opinion in Godfrey that an overbroad and vague construction of §(b)(7) does not permit a principled way to distinquish between the cases in which the death penalty is imposed, from the many cases in which it is not.

In analyzing pre-1980 opinions of the Georgia Supreme Court, Godfrey held the following to be the constitutional construction of §(b)(7):

> [T]he phrase, 'depravity of mind,' comprehended only the kind of mental state that led the murderer to torture the victim or to commit an aggravated battery before killing the victim ... [T]he word, 'torture,' must be construed in pari materia with 'aggravated battery' so as to require evidence of serious physical abuse of the victim before death.
>
> Godfrey 446 U.S. at 431.

In his dissent in Godfrey Mr. Chief Justice Burger acknowledges that the plurality grafted a substantive narrowing construction on §(b)(7) by the requirement of "evidence of serious physical abuse." 446 U.S. at 443 (Burger, C.J., dissenting). Indeed, the plurality opinion took a principled, substantive step that wasn't necessary to invalidate Godfrey's death sentence given the procedural defects in the jury instructions and jury findings. This Court sent a clear signal to the Supreme Court of Georgia. It delimited the constitutional bounds of Georgia's catchall aggravating circumstance.

Yet, barely a month after the decision in Godfrey the Supreme Court of Georgia issued its opinion in Hance v. State, 245 Ga 856, 268 S.E.2d 339 (1980), cert. denied ___U.S.___, 101 S.Ct. 796 (1980). The dilution of Godfrey is glaring:

> Evidence of psychological abuse by the defendant to the victim before death where it is shown to have resulted in severe mental anguish to the victim in anticipation of physical harm may amount to serious physical abuse (i.e. torture to the victim), and also will support a finding of depravity of mind of the defendant.
>
> 249 S.E.2d at 265.

The above statement in Hance is clearly dicta as there was sufficient evidence in that case of serious physical abuse of the victim to bring the case within Godfrey limits, for the victim was repeatedly struck in the face with a jack-handle prior to her death.

In the instant case it was neither alleged nor proven that there was an aggravated battery, that is, any serious physical abuse of the victim before death,[4] but Hance had already set the stage for the finding of sufficiency of the §(b)(7) aggravating circumstance upon evidence of mental anguish. By extending the Godfrey construction to include psychological abuse where it amounts to mental anguish to the victim in anticipation of physical harm, the Supreme Court of Georgia has abandoned the requirement of reaching only "core" cases under (b)(7).[5]

The Georgia Court itself has recognized the possibility of abuse of the §(b)(7) statutory aggravating circumstance. Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976), cert. denied 431 U.S. 933 (1979). Yet "torture," as

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4/ In Godfrey, supra, this Court noted that the term "aggravated battery" is defined in Ga. Code Ann. §26-1305: "A person commits aggravated battery when he maliciously causes bodily harm to another by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring his body or member thereof." 446 U.S. at 431-432, n.11. In order to constitute aggravated battery, the bodily harm must occur before death. Id.

5/ The finding of torture by the Court in this case contrasts sharply with the torture-murder in McCorquodale v. State, 233 Ga. 369, 211 S.E.2d (footnote continued on next page)

applied in Hance and the instant case, is clearly broader than the commonly understood meaning of the phrase and now includes situations where the victim briefly anticipates his or her death or experiences pain while dying.

It simply cannot be argued that the anticipation of physical harm, as a basis for concluding the victim was tortured, provides any principled way to distinguish among murder cases for the imposition of the death penalty. Moreover, Godfrey set forth a "bright-line" narrowing construction for the very reason that there must be clear and objective standards which provide detailed guidance both to the deliberating jury and for the mandated review process. See Furman v. Georgia, 408 U.S. 238 (1972). As Mr. Justice Marshall noted in his concurrence in Godfrey:

> The Georgia Court has given an extraordinarily broad meaning to the word 'torture.' Under that Court's view, 'torture' may be present whenever the victim suffered pain or anticipated the prospect of death.
>
> 420 U.S. at 441, n. 12 (Marshall, J., concurring).

Indeed, had the Hance construction been expressly articulated by the Georgia Supreme Court prior to Godfrey, this Court may well have struck it down in Godfrey, for under the Hance construction of "torture" the circumstances surrounding the death of the second of Godfrey's victims surely amounted to mental anguish through anticipation of physical harm. "What terror must have run through the veins [of the first victim's mother] as

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5/ (footnote continued from previous page)
577 (1977), cited by this Court in Godfrey 446 U.S. at 429-430, where the victim had been beaten, burned, raped, cut with a razor and scissors, and subjected to salt being placed in the wounds and hot wax dripped over her body before she was killed.

she witnessed her daughter's hideous demise and then came to terms with the imminence of her own. Was this not torture?" Godfrey, 446 U.S. at 451 (White, J., dissenting). Mr. Justice White was dissatisfied with the negative response of six Justices of this Court to his question, a negative response which illustrates the overly broad construction now expressly applied by the Supreme Court of Georgia to the term "torture."

In addition to this case and Hance, supra, the Georgia Supreme Court has applied this construction of §(b)(7) in Dampier v. State, 245 Ga. 882, 268 S.E.2d 249 (1980) (addendum opinion issued subsequent to Godfrey), cert. denied ___ U.S. ___, 101 S.Ct. 337 (1980). In Dampier, the death sentence rested partially upon the §(b)(7) aggravating circumstance where the only evidence was the mental anquish involved as the victim begged for his life for a full five minutes before the murder. Unlike the instant case, however, the jury's finding of death in Dampier was also based upon aggravating circumstance §(b)(2), which under Georgia law would sustain the death sentence even if the §(b)(7) finding were invalidated.[6/] See Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979).

In articulating the novel Hance extension of the Godfrey limiting construction, the Georgia Supreme Court has plainly contravened the express holding of Godfrey as to the constitutional bounds of Georgia's catchall aggravating

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[6/] The only other opinion of the Goergia Supreme Court sustaining a §(b)(7) finding upon evidence of mental anquish to the victim in anticipation of physical harm subsequent to Godfrey is Brown v. State, ___ Ga. ___, 275 S.E.2d 52 (1981). Brown is a companion case to the instant case and arises from the same set of facts. Brown, like High, involves a finding of a sole aggravating circumstance, §(b)(7).

circumstance. It has injected elements of arbitrariness and overinclusiveness into death deliberation and review. It has obscured the substantive line this Court erected in Godfrey between cases at the "core" and cases on the "periphery" of §(b)(7). In rejuvenating the risk that the punishment of death will be inflicted in an arbitrary and capricious manner, it acts unconstitutionally. Therefore, this Court should grant certiorari to consider whether the provisions of Ga. Code Ann. §27-2534.1(b)(7) were applied to petitioner in violation of the Eighth and Fourteenth Amendments and in contravention of the principles adjudged in Godfrey.

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER PETITIONER IS ENTITLED TO A NEW SENTENCING HEARING WHERE THE JURY WOULD BE INSTRUCTED ACCORDING TO A PROPER, NARROW CONSTRUCTION OF GEORGIA CODE ANN. §27-2534.1(b)(7).

The jury at the sentencing hearing was instructed that it could impose the death sentence upon petitioner under Ga. Code Ann. §27-2534.1(b)(7) if it found that "the offense of murder and/or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."[7/]

The Supreme Court of Georgia upheld the §(b)(7) finding subsequent to this Court's 1980 opinion

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7/ See App. at 14a. The jury was also instructed that it could impose the death penalty if it found that any of the offenses was committed while the offender was engaged in the commission of another capital felony or aggravated battery. Ga. Code Ann. §27-2534.1(b)(2). The jury did not find this aggravating circumstance to exist. App. at 25a.

in Godfrey, stating that "the evidence factually substantiates and supports the finding of this aggravating circumstance and the sentences of death by a rational trier of fact beyond a reasonable doubt." High v. State, 276 S.E.2d at 14, App. at 10a. This Court should grant certiorari to consider whether an instruction providing the bare words of §(b)(7) is sufficient to uphold petitioner's death sentence.

Under Gregg v. Georgia, 428 U.S. 153, 198 (1976) (opinion of Stewart, Powell and Stevens, J.J.), the sentencer's discretion must be guided by "clear and objective standards." The process for reviewing the death sentence must be rational and a rational review can occur only where the jury is given specific and detailed instructions for their deliberation. See Woodson v. North Carolina, 428 U.S. 280 (1976).

In Godfrey, a plurality of this Court noted that it is an error of constitutional magnitude for the jury instructions not to delineate a proper, narrow construction of aggravating circumstance §(b)(7).[8/] The Godfrey trial court instructed the jury only that a death sentence was proper upon a finding that the offense was "outrageously or wantonly vile, horrible and inhuman." Id. at 426.

The second sub-clause of §(b)(7) is equally overbroad, id. at 431, and simply merging the two overbroad clauses, as was done at petitioner's sentencing hearing, does nothing to channel the sentencing discretion of the jury.

8/ Mr. Chief Justice Burger, dissenting in Godfrey on the actual content of the limiting construction, did not comment on the plurality holding as to the inadequacy of the trial court's definition of §(b)(7)'s terms.

The jury in petitioner's case was provided with no definition of "torture"or "aggravated battery" or any of the other §(b)(7) terms. There is nothing in these few words of §(b)(7) that implies "any inherent restraint on the arbitrary and caprious infliction of the death sentence." Godfrey 446 U.S. at 428.

The process of imposing the death sentence on petitioner was, therefore, constitutionally inadequate.

> The jury must be instructed on the proper narrow construction of the statute. The Court's cases make clear that it is the sentencer's discretion that must be channeled and guided by clear, objective and specific standards ... to give the jury an instruction in the form of the bare words of the statute -- words that are hopelessly ambiguous and could be understood to apply to any murder ...-- would effectively grant it unbridled discretion to impose the death penalty.
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> Godfrey, 446 U.S. at 437 (Marshall, J., concurring).

The proper course for the Supreme Court of Georgia would have been to remand the case to the trial court for a new sentencing hearing where the Godfrey limiting construction would be set forth to the jury. Both Furman v. Georgia, supra, and Gregg v. Georgia, supra, make it abundantly clear that it is the discretion of the jury that must be properly channeled and limited. The jury should not have been permitted to grapple with the broad and vague language of the statute for it is unlikely that there was any principled way for them to distinguish why this case called for the imposition of death. A mere affirmance of petitioner's sentence, just as was done in Godfrey, does not cure the error.

This is especially true here for the jury found but a sole aggravating circumstance, §(b)(7), and there was no allegation or evidence of serious physical abuse of the victim before death, required evidence under the substantive Godfrey limitation. As Mr. Justice Marshall stated:

> Such a defect could not be cured by the post hoc narrowing construction of an appellate court. The reviewing court can determine only whether a rational jury might have imposed the death penalty if it had been properly instructed; it is impossible for it to say whether a particular jury would have so exercised its discretion if it had known the law.
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> 420 U.S. at 427 (Marshall, J., concurring).

The decision of the Georgia Supreme Court was precisely a post-hoc narrowing construction. The "mental anquish" construction was first expressed by the Georgia Supreme Court subsequent to Godfrey, in Hance, supra, and was conveniently applied to petitioner to bring his case within the catchall circumstance.

An appellate court can no more than guess as to what a jury might have done had it been provided with a proper narrowing construction. In fact, the jury's own interpretation of §(b)(7) can only be the subject of sheer speculation. Speculation, whether it be by the jury or by an appellate court, is inconsistent with the recognition that there is a heightened "need for reliability in the determination that death is an appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. at 305 (opinion of Stewart, Powell and Stevens, J.J., concurring). In affirming petitioner's sentence of death in the wake of Godfrey, the Georgia Supreme Court stated, in effect, that the absence of a proper limiting interpretation of §(b)(7) was harmless error given that the evidence was sufficient to sustain a §(b)(7) finding. Yet, the constitutional right of a defendant to have a sentence of death imposed upon reason rather than upon caprice and emotion is perhaps as fundamental a right as exists under our system of law. See Gardner v. Florida, 430 U.S. 349 (1977). This Court has recognized that certain rights are of such importance that their denial can never be deemed

to be harmless. See Chapman v. California, 368 U.S. 18. 23 (1967). Therefore, the treatment by the Georgia Supreme Court of petitioner's death sentence, which amounts to harmless error analysis, can not bear constitutional scrutiny.

A number of §(b)(7) cases have been considered by the Georgia Supreme Court subsequent to Godfrey on the issue of whether the pre-Godfrey imposed death sentences were proper.[9/] The Supreme Court of Georgia has treated each case in exactly the same way, that is, reviewing the record and concluding that a properly instructed jury could have still found the existence of the aggravating circumstance beyond a reasonable doubt.

Yet, none of these cases have involved the unique circumstances here present: (1) a post-hoc narrowing construction placed on §(b)(7) which dispensed with the need for proof of "serious physical abuse" of the victim before death, and (2) a jury which rejected existence of an independent aggravating circumstance, namely, §(b)(2).

Therefore, it is clear that the actual construction given by the trial court as to §(b)(7) was as decisive and as defective as the instruction given in the Godfrey trial where only §(b)(7) was found and where there was no evidence of aggravated battery or of the "serious physical abuse" of the

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9/ Illustrative of such cases are Brooks v. Georgia, 244 Ga. 574, 261 S.E.2d 379(1979), vacated and remanded 446 U.S. 961 (1980), death sentence reinstated 246 Ga. 262, 271 S.E.2d 172 (1980), cert. denied ___ U.S. ___, 49 U.S.L.W. 3785 (April 21, 1981); Mulligan v. State, 245 Ga. 266, 264 S.E.2d 204 (1979), reexamined in light of Godfrey, 245 Ga. 881, 268 S.E.2d 351 (1980), cert. denied ___U.S. ___, 66 L.E.2d 250 (1980); Tyler v. State, ___ Ga. ___, 274 S.E.2d 549 (1981).

victims before death. Under these circumstances, the action of the Supreme Court of Georgia in affirming petitioner's sentence without a new hearing where the sentencer would be guided by specific and detailed criteria is seriously deficient. This Court should review the substantial constitutional question presented.

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE INFLICTION OF THE DEATH PENALTY ON A CHILD WHO WAS UNDER THE AGE OF EIGHTEEN AT THE TIME OF THE CRIME CONSTITUTES CRUEL AND UNUSAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner, Jose Martinez High, was seventeen years, eleven months, and ten days old on July 26, 1976, the day of the offenses for which he was given a sentence of death.[10/] Petitioner contends that it is cruel and unusual punishment to inflict the death penalty on a child under the age of eighteen at the time of the offense.

This Court granted certiorari on a nearly identical question in Eddings v. Oklahoma, No. 80-5727, on April 6, 1981, to consider the important questions of constitutional law and social policy involved with inflicting the death penalty on a juvenile.

Petitioner prays that the Court grant certiorari on this question and set the case down for oral argument in tandem with Eddings v. Oklahoma, supra, or alternatively, defer consideration of this case pending issuance of the opinion in Eddings v. Oklahoma, supra.

10/ See footnote 1, supra at 3.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia in High v. State, ___Ga.___, 276 S.E.2d 5 (1981).

Respectfully submitted,

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80-6843

APPENDIX

JORDAN, Chief Justice.

A divorce was granted by the court by judgment reserving the issue of division for property. The jury awarded the house to the former wife and certain personalty to the former husband. The husband filed a motion for new trial. The wife's motion to dismiss the husband's motion for new trial was granted. The husband's motion to vacate the order dismissing his motion for new trial was overruled by order, which order the husband sought to appeal.

The husband argues that he is not appealing an order granting permanent alimony, but that he is appealing an order denying the motion to vacate an order dismissing a motion for new trial. For legal purposes, this is the same as an appeal from an order granting permanent alimony and it is dismissed for failure to file an application to appeal pursuant to Code Ann. § 6-701.1(b). See *Chandler v. Cochran*, — Ga. —, 275 S.E.2d 657 (1981).

Appeal dismissed.

All the Justices concur.

Jose M. HIGH

v.

The STATE

No. 36689.

Supreme Court of Georgia.

Feb. 24, 1981.

Defendant was convicted before the Superior Court, Taliaferro County, Robert L. Stevens, J., of murder, two counts of kidnapping with bodily injury, armed robbery, possession of a firearm during the commission of a crime and aggravated assault, and he appealed. The Supreme Court, Clarke, J., held that: (1) trial court did not err in imposing limitations upon defendant during voir dire examination; (2) trial court did not err in permitting chief investigating officer and sheriff, who were also state's witnesses, to remain in courtroom after rule of sequestration had been invoked; (3) convictions for murder and kidnapping with bodily injury were not included offenses, even though bodily injury alleged was killing of the victim, since neither of the crimes could have been established by proof of the same or less than all the facts required to establish the commission of the crime charged; (4) code section making confession admissible if it was made voluntarily, without being induced by another by slightest hope of benefit or remotest fear of injury, was not unconstitutional on its face or in its application; and (5) evidence was sufficient for jury to find aggravating circumstances for imposition of death penalty.

Affirmed in part, reversed in part, and vacated and remanded in part.

Hill, C. J., concurred in judgment only as to divisions 6, 8 and 12 of the opinion.

1. Constitutional Law ⇐267

Defendant was not denied due process of law by the peremptory striking of some black potential traverse jurors. U.S.C.A. Const. Amend. 14.

2. Costs ⇐302.2(2)

Defendant was not prejudiced by denial of his motion seeking funds to hire investigators and obtain expert witnesses, where defendant was represented by retained attorney assisted by two paid law student interns, where expert testimony was not crucial to state's case, and where no showing was made as to need of expert testimony on behalf of defendant.

3. Jury ⇐33(1)

Defendant was not entitled to secure additional members of his race for possible jury service after 32 potential jurors of defendant's race were excluded for cause under *Witherspoon* during voir dire process,

where defendant made no contention that the persons selected were not competent veniremen properly drawn to sit on the panel nor that jury list was improperly constituted.

4. Assault and Battery ⇐92(1)
Homicide ⇐250
Kidnapping ⇐5
Robbery ⇐24.1(3)
Weapons ⇐17(4)

In prosecution for murder, two counts of kidnapping with bodily injury, armed robbery, possession of firearm during commission of crime and aggravated assault, evidence was sufficient for a rational trier of fact to find essential elements of the crimes beyond a reasonable doubt.

5. Criminal Law ⇐339.6

Identification procedure of defendant was not impermissibly suggestive so as to preclude witness from identifying defendant at trial, since fact that witness was wearing glasses and in an excited state during the crime went to the witness' credibility and the weight of his testimony, not its admissibility.

6. Criminal Law ⇐655(1)

Trial court did not express opinion but was merely ruling on motion which had been made by defendant when it stated, in its ruling denying motion for in camera inspection, that it had found nothing exculpatory or favorable to defendant in the files of the district attorney. Code, § 81–1104.

7. Jury ⇐42

Trial court's excuse of prospective juror on its own motion on ground that juror was incompetent to serve was not error where, during voir dire, the juror, in responding to trial court's inquiry, stated that she cold not understand questions of a most elementary nature that were propounded by either defense counsel or counsel for the state, and it was evident that the juror could not understand the nature of the proceedings.

8. Jury ⇐131(13)

Trial court did not abuse its discretion in denying defendant's motion to question each prospective juror on voir dire outside presence of other jurors, where trial court instructed panel that questions of counsel were merely aids in selecting an impartial jury and that members of panel were insofar as trial was concerned, to give no consideration whatsoever to what was said during voir dire, and where defendant did not show substantial prejudice by court's failure to allow the sequestered voir dire.

9. Jury ⇐131(8)

Trial court did not abuse its discretion in limiting the voir dire examination of prospective jurors by refusing, upon proper objection, to allow examination of veniremen with regard to burden of proof, reasonable doubt and questions of evidence, and by prohibiting defense counsel from asking questions which were attempts to obtain a prejudgment of his case.

10. Jury ⇐131(4)

Trial court did not err in allowing state to qualify prospective jurors as to kinship with other two codefendants, since such qualification could not have prejudiced defendant as participation of the codefendants in the crime was necessary part of state's proof.

11. Criminal Law ⇐730(6)

Comments during trial by district attorney, including statement that he had been district attorney for past 19 years, were not such as to compel a reversal of the convictions, since record did not support contention that remarks were made with disturbing frequency or made a mockery of proceeding and since trial court in each instance admonished district attorney concerning any improper argument.

12. Criminal Law ⇐665(3)

Where district attorney requested that chief investigating officer remain in courtroom to assist state in presentation of its case and where sheriff was allowed to remain in courtroom in his official capacity, trial court did not err in permitting those witnesses to remain in courtroom even though rule of sequestration had been invoked.

12. Criminal Law ⇐404(3, 4), 438(2)

Trial court did not err in admitting photographs of coconspirators, guns of coconspirators, tires and tire prints from car used in robbery, evidence of fingerprints taken from automobile used in robbery and money tray which was found after the crime, since evidence of weapons, automobile with fingerprints located thereon and photographs were properly admitted as part of state's proof as to conspiracy to rob service station and kill witnesses, and since, despite defense claim of lack of positive identification of the money tray, tires and tire prints, the state introduced evidence to show that money tray was either money tray from service station or one identical to it and that tires were of same brand and type as tire prints which were taken from the scene.

14. Criminal Law ⇐419(1)

Testimony of G.B.I. agent that he observed doctor at university hospital emergency room remove projectile from wrist of one of the victims of kidnapping and robbery, and that he took custody of the projectile, was not hearsay.

15. Criminal Law ⇐1206(1)

Trial court did not err in imposing sentence of death on asserted ground that under state statute as applied, there was substantial risk that death penalty would be inflicted in arbitrary and capricious manner. U.S.C.A.Const. Amends. 8, 14.

16. Indictment and Information ⇐191(9)

Where one is charged with armed robbery and separate crime of possession of a firearm during commission of a crime, the possession count may or may not be included in the greater crime of armed robbery. Code, § 26-506.

17. Indictment and Information ⇐191(9)

Where evidence discloses that crime of armed robbery was committed with same firearm as that for which defendant is charged with possessing, lesser crime of possession of firearm during commission of crime is included in the greater crime of armed robbery. Code, § 26-[illegible]

18. Criminal Law ⇐30

In prosecution for murder, two counts of kidnapping with bodily injury, armed robbery, possession of firearm during commission of crime and aggravated assault, lesser crime of possession of firearm during commission of crime was included in greater crime of armed robbery since crime of armed robbery was committed with same firearm which defendant was charged with possessing; but aggravated assault did not merge as a matter of law or fact with the armed robbery count; and kidnapping of victim with bodily injury did not merge as a matter of law or fact with armed robbery of service station. Code, § 26-506.

19. Criminal Law ⇐29

Murder and kidnapping of victim with bodily injury were not included offenses so as to bar defendant from being prosecuted and subsequently convicted of both crimes, since neither of the crimes could have been established by proof of the same or less than all of the facts required to establish the commission of the crime charged, in that conviction of murder required finding of malice aforethought, while kidnapping required no such finding, and kidnapping required a finding of unlawful abduction, while such finding was not necessary to conviction for murder. Code, §§ 26-503(a), 26-506.

20. Indictment and Information ⇐191

Crime of aggravated assault was included offense of crime of kidnapping with bodily injury mandating reversal of defendant's conviction for aggravated assault, since elements of crime of aggravated assault must have been proven in order to sustain conviction for kidnapping with bodily injury.

21. Constitutional Law ⇐266.1(3)
Criminal Law ⇐517.1(1)

Code section providing that for a confession to be admissible, it must have been made voluntarily, without being induced by another by slightest hope of benefit or remotest fear of injury was not unconstitutional on its face or in its application in violation of Eighth and Fourteenth Amend-

ments, despite claim that section does not provide for determination of reliability of confession as condition of admissibility. Code, §§ 38-411, 38-420; U.S.C.A.Const. Amends. 6, 14.

22. Criminal Law ⇐1208(1)
Homicide ⇐354

In prosecution for murder, two counts of kidnapping with bodily injury, armed robbery, possession of firearm during commission of crime and aggravated assault, there was sufficient evidence to support jury finding of aggravating circumstances surrounding murder, armed robbery and kidnapping with bodily injury such that the sentences of death were not imposed by jury under influence of passion, prejudice or any arbitrary factor. Code, §§ 27-2534.1(b)(7), 27-2537(c)(1-3).

23. Criminal Law ⇐1208(1)

Evidence of psychological abuse of victim before death, where it is shown to have resulted in severe mental anguish to the victim in anticipation of physical harm, may amount to serious physical abuse and will support finding of depravity of mind of the defendant under code section providing for imposition of death penalty. Code, § 27-2534.1(b)(7).

24. Criminal Law ⇐1208(1)

In determining whether evidence shows depravity of mind under code provision governing imposition of death penalty, the age and physical characteristics of the victim may be considered. Code, § 27-2534.1(b)(7).

25. Criminal Law ⇐1158

Imposition of death penalty for armed robbery and kidnapping with bodily injury were set aside and remanded to trial court with direction that defendant be resentenced to life imprisonment as to kidnapping with bodily injury count and that trial judge sentence defendant for offense of armed robbery as provided by law.

John H. Ruffin, Jr., Augusta, for Jose Martinez High.

Kenneth E. Goolsby, Dist. Atty., Thomson, Arthur K. Bolton, Atty. Gen., for the State.

CLARKE, Justice.

The appellant, Jose Martinez High, was tried by a jury in the Superior Court of Taliaferro County for the offenses of murder, two counts of kidnapping with bodily injury, armed robbery, possession of a firearm during the commission of a crime and aggravated assault. He was convicted of all charges and sentenced to death for armed robbery, murder and two counts of kidnapping. The appellant was also sentenced to five years imprisonment on the charge of possession of a firearm during the commission of a crime and ten years imprisonment on the aggravated assault charge. The case is here on direct appeal and for mandatory review of the death sentences imposed. The facts surrounding the crimes charged and the death of the young victim are amply set out in the companion case of *Ruffin v. State*, 243 Ga. 95, 252 S.E.2d 472 (1979), and will not be repeated here.

ENUMERATIONS OF ERROR

[1] 1. The defendant was not denied due process of law as claimed by the preemptory striking of some black potential traverse jurors. *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965); *Taylor v. State*, 243 Ga. 222, 253 S.E.2d 191 (1979), see also *Willis v. State*, 243 Ga. 185, 253 S.E.2d 10 (1979); *Jones v. State*, 243 Ga. 820, 256 S.E.2d 907 (1979).[1]

[2] 2. Appellant's attorney upon motion sought funds to hire investigators and obtain expert witnesses. The only evidence presented by the appellant in support of his motion was as to the size of the district attorney's staff, the resources available to the district attorney, and the amount of salaries paid to the district attorney and his

1. We note that four of the twelve petit jurors selected were black and one of the two alternates selected was black.

staff. The state presented evidence that the appellant was represented by a retained attorney who was assisted by two paid law student interns supplied by the Southern Poverty League. Expert testimony was not crucial to the state's case and no showing was made as to the need for expert testimony on behalf of the appellant. "The granting or denial of a motion for appointment of expert witnesses lies within the sound discretion of the trial court and unless there has been an abuse of discretion, the trial court's ruling would be upheld." *Patterson v. State*, 239 Ga. 409(3), 238 S.E.2d 2 (1977). The appellant has made no showing of prejudice and his second enumeration is therefore without merit. *Whitaker v. State*, 246 Ga. 163, 269 S.E.2d 436 (1980).

[3] 3. Thirty-two potential jurors of appellant's race were excluded for cause under *Witherspoon* during the voir dire process. Appellant moved for a continuance to secure additional members of his race for possible jury service. The trial court denied the motion and the appellant asserts error.

When it became apparent that it was necessary to impanel additional jurors because of the number of jurors who were challenged for cause, the trial court drew additional names from the jury box to fill the deficit. Appellant makes no contention that the persons selected were not competent veniremen properly drawn to sit on the panel. Nor does he contend that the jury list was improperly constituted. "A defendant is entitled to array of properly drawn impartial jurors to which he may direct his preemptory challenges. *Franklin v. State*, 245 Ga. 141, 263 S.E.2d 666 (1980). A party is entitled to this as a matter of right; but, conversely, he is entitled to no more." *Dampier v. State*, 245 Ga. 427, 265 S.E.2d 565 (1980). Appellant's third enumeration is without merit. *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975).

4. In his fourth enumeration of error, the appellant contends that the trial court erred in failing to grant his motion for new trial. We do not agree.

[4] We find upon review of the evidence in light most favorable to the verdict, a rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Sentence review ante. At trial, the surviving victim, Henry Phillips positively identified the defendant as being one of the three persons who robbed the gasoline station and subsequently shot him and his stepson. The witness testified that the appellant was the person who pointed a pistol in his face immediately after the three robbers drove into the station and asked for gas. He further testified that the station was well lit.

[5] The appellant contends that the trial court erred in permitting the witness to identify the defendant at trial in that an adequate basis for determining the reliability of such identification was lacking. He bases this contention upon the witness' wearing of glasses and excited state during the crime. However, these factors go to the witness' credibility and the weight of his testimony and not to the admissibility of his testimony. See *Watkins v. Sowders*, — U.S. —, 101 S.Ct. 654, 66 L.Ed.2d 549 (1981); *Gresham v. State*, 246 Ga. 574, 272 S.E.2d 308 (1980). The record in this case simply does not support a contention that the identification procedure was impermissibly suggestive. *Thomas v. State*, 245 Ga. 688, 267 S.E.2d 253, (1980); *McClesky v. State*, 245 Ga. 108, 263 S.E.2d 146 (1980); *Burrell v. State*, 239 Ga. 792, 239 S.E.2d 11 (1977).

[6] 5. At the call of the case and prior to a jury being impaneled but in the presence of the veniremen, the trial court ruled on the appellant's motion for in camera inspection. The trial court stated in its ruling that it found nothing exculpatory or favorable to the defendant in the files of the district attorney. Appellant then moved for a dismissal of the indictment or in the alternative to continue the case until such time as a new panel which had not heard the court's ruling could be obtained.

The court overruled the objection and instructed all members of the jury panel present in the courtroom that they were not to be concerned with the rulings of the court in that such rulings were not an expression of opinion by the court of the facts of the case.

The appellant argues that the ruling of the trial court amounted to an impermissible expression of opinion prohibited by Code Ann. § 81-1104. We do not agree. It is clear from the record that the trial judge was not expressing an opinion but ruling upon the motion which had been made by the appellant. *Wright v. State*, 223 Ga. 849, 159 S.E.2d 76 (1968). See *Tucker v. State*, 245 Ga. 68, 263 S.E.2d 109 (1980); *Whisman v. State*, 221 Ga. 460, 145 S.E.2d 499 (1965).

6. It is clear from the voir dire examination that the jurors excused for being conscientiously opposed to the death penalty were "irrevocably committed before the trial began to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings." *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); *Thomas v. State*, 245 Ga. 688, 267 S.E.2d 253 (1980); *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1977); *Corn v. State*, 240 Ga. 130, 240 S.E.2d 694 (1977).

[7] While not raised as error, as in part of our independent review, we have noted that a juror was excused over objection by the trial court on the grounds that she was incompetent to serve. During voir dire, the prospective juror, in responding to the trial court's inquiry, stated that she could not understand the questions of a most elementary nature that were propounded by either the defense counsel or counsel for the state. It was evident that this juror could not understand the nature of the proceedings, and we find no error in the court upon its own motion excusing her. Code Ann. § 59-805. *Floyd v. State*, 237 Ga. 865, 229 S.E.2d 910 (1976); *Patterson v. State*, supra. See *Harrow v. State*, 239 Ga. 162, 236 S.E.2d 257 (1977).

[8] The appellant argues that the trial court erred in refusing to allow him to question each prospective juror on voir dire outside the presence of the other jurors. Such matters are necessarily within the sound discretion of the trial court. *Finney v. State*, 242 Ga. 599, 250 S.E.2d 466 (1978); *Green v. State*, 246 Ga. 598, 272 S.E.2d 475 (1980). We find upon review of voir dire that the trial court did not abuse its discretion in denying the appellant's motion especially in view of the trial court's instructions to the panel that the questions of counsel were merely aids in selecting an impartial jury and that members of the panel were to give no consideration whatsoever to what was said during voir dire, insofar as the trial of the case was concerned. Nor has the defendant shown "substantial prejudice" by the court's failure to allow sequestered voir dire. *Duckworth v. State*, 246 Ga. 636, 272 S.E.2d 342 (1980).

[9] The appellant contends that the trial judge abused his discretion in limiting voir dire examination of prospective jurors. We do not agree. The trial judge upon proper objection refused to allow the examination of veniremen with regard to burden of proof, reasonable doubt and questions of evidence. These were technical legal questions and therefore prohibited. *Stanley v. State*, 234 Ga. 19, 214 S.E.2d 511 (1975); *Cobb v. State*, 244 Ga. 344, 260 S.E.2d 60 (1979). Likewise, defense counsel was prohibited from asking questions which were attempts to obtain a prejudgment of the case which is impermissible. *Phillips v. State*, 225 Ga. 36, 165 S.E.2d 703 (1968); *Cobb v. State*, supra.

[10] The trial court did not err in allowing the state to qualify the prospective jurors as to kinship with the other two defendants. Contrary to appellant's argument such qualification could not have prejudiced appellant as the participation of the co-defendants in the voir dire was a part of the state's case.

[11] 7. During opening argument the district attorney introduced himself to the

ing in part, "I've been your district attorney for the last nineteen years." The appellant's attorney objected as he objected to other remarks of the district attorney throughout the trial as improper argument. The record simply does not support the contention of appellant that the remarks of the district attorney were made with disturbing frequency or made a mockery of the proceeding. In each instance the trial court admonished the district attorney concerning any improper argument. This enumeration is without merit. See *Watkins v. State*, 237 Ga. 678, 229 S.E.2d 465 (1976); *Dorris v. State*, 237 Ga. 837, 229 S.E.2d 638 (1976); *Fears v. State*, 236 Ga. 660, 225 S.E.2d 4 (1976); *Shirley v. State*, 245 Ga. 616, 266 S.E.2d 218 (1980).

[12]. 8. The appellant contends that the trial court erred in permitting state's witnesses to remain in the courtroom after the rule of sequestration had been invoked. This same argument was raised in *Ruffin v. State*, supra, and decided adversely to appellant's position. The district attorney requested that the chief investigating officer remain in the courtroom in order to assist the state in the presentation of its case. The sheriff was allowed to remain in the courtroom in his official capacity. *Hardy v. State*, 245 Ga. 272, 264 S.E.2d 209 (1980); *Hardy v. State*, 245 Ga. 673, 266 S.E.2d 489 (1980); *O'Dillon v. State*, 245 Ga. 342, 265 S.E.2d 18 (1980). See *Dampier v. State*, 245 Ga. 427, 265 S.E.2d 565 (1980).

[13] 9. The appellant argues that the trial court erred in admitting certain items into evidence. These items included photographs of the co-conspirators, the guns of the co-conspirators, tires and tire prints from the car used in the robbery, evidence of fingerprints taken from the automobile used in the robbery and the money tray which was found after the crime. Evidence of the weapons used by the co-defendants, the car driven by the co-defendants with their fingerprints located thereon and photographs of the co-defendants were properly admitted as part of the state's proof as to the conspiracy to rob the service station and kill the witnesses. See *Ruffin v. State*, supra. The gist of appellant's objection to the introduction of the money tray, tires and tire prints is that they were not positively identified as the money tray which came from the service station and that the witnesses could not positively identify that the tire prints were made by the tires found on the automobile used in the robbery. However, the state introduced evidence to show that the money tray was either the money tray in the service station or one identical to it and that the tires were of the same brand and type as the tires which made the prints taken from the scene. The trial court did not err in admitting such evidence. *Patterson v. State*, 233 Ga. 724, 213 S.E.2d 612 (1975). See *Ruffin v. State*, supra.

[14] 10. The appellant contends that the trial court erred in admitting the testimony of agent Monahan of the G.B.I. in that such testimony was hearsay. We do not agree. The agent testified that he observed Dr. Carrington at the university hospital emergency room remove a projectile from the wrist of one of the victims, and he took custody of that projectile. Such testimony is not hearsay.

[15] 11. The appellant contends that the trial court erred in imposing the sentence of death in that under the Georgia statute as applied, there is a substantial risk that the death penalty will be inflicted in an arbitrary and capricious manner. This argument has been raised before and decided adversely to the appellant's position. *Gregg v. Georgia*, 228 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Hance v. State*, 245 Ga. 856, 268 S.E.2d 339 (1980); *Cape v. State*, 246 Ga. 520, 272 S.E.2d 487 (1980).

[16-18] 12. The appellant alleges that Count 1, armed robbery, merged with Count 2, possession of a firearm during the commission of a crime. We agree. Where one is charged with armed robbery and a separate crime of possession of a firearm during the commission of a crime, the possession count may or may not be included in the greater crime of armed robbery. Where, as here, the evidence discloses that

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the crime of armed robbery was committed with the same firearm as that for which the appellant is charged with possessing, the lesser crime of possession of a firearm during the commission of a crime is included in the greater crime of armed robbery. *Roberts v. State*, 228 Ga. 298, 185 S.E.2d 385 (1971); *Chumley v. State*, 235 Ga. 540, 221 S.E.2d 13 (1975); Code Ann. § 26-506. However, Count 6, aggravated assault upon the person of Henry Phillips, does not merge as a matter of law or fact with Count 1, armed robbery. *Roberts v. State*, supra. Furthermore, under the evidence of this case, the kidnapping of Bonnie Bulloch with bodily injury did not merge as a matter of law or a matter of fact with the armed robbery of the service station.

[19] Appellant contends under Code Ann. § 26-506 the evidence of the murder, Count 5 of the indictment, cannot be used as the basis for the separate conviction of the murder count and also to authorize a conviction of kidnapping with bodily injury to the murder victim. *Allen v. State*, 233 Ga. 200, 210 S.E.2d 680 (1974); *Presnell v. State*, 241 Ga. 49, 243 S.E.2d 496 (1978). See *State v. Estevez*, 232 Ga. 316, 206 S.E.2d 475 (1974). The kidnapping indictment in this case alleges the bodily injury to be the murder of the victim. In *Potts v. State*, 241 Ga. 67, 243 S.E.2d 510 (1978), the defendant was convicted for the murder of Michael Priest and kidnapping with bodily injury of Michael Priest. The bodily injury alleged was the killing of the victim. We held in *Potts* that as a matter of fact, as well as a matter of law, the murder of the victim and the kidnapping of the victim with bodily injury were not included offenses so as to bar the defendant from being prosecuted and subsequently convicted of both crimes. This conclusion was reached because neither of the crimes could have been established by proof of the same or less than all of the facts required to establish the commission of the crime charged. Code Ann. § 26-505(a). The murder required a finding of malice aforethought but the kidnapping required no such finding. The kidnapping required a finding of unlawful abduction, while such a finding is not necessary for the conviction for murder. We here follow the rule established in *Potts* and hold that the conviction and sentence of death for murder and kidnapping with bodily injury must be affirmed.

[20] The same rationale does not apply to the conviction for kidnapping with bodily injury and the conviction for aggravated assault of Henry Phillips. This is true because the elements of the crime of aggravated assault must have been proven in order to sustain a conviction for the crime of kidnapping with bodily injury. Therefore, the aggravated assault in this case is an included offense of the crime of kidnapping with bodily injury and the conviction for aggravated assault, Count 6 of the indictment, is reversed. *Williams v. State*, 240 Ga. 244, 232 S.E.2d 238 (1977).

[21] In his last enumeration of error, the appellant urges that Code Ann. § 38-411 is unconstitutional on its face and in its application in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. That Code section reads as follows: "To make a confession admissible it must have been made voluntarily, without being induced by any other by the slightest hope of benefit or remotest fear of injury." The appellant argues that because the statute on its face or as applied does not provide for a determination of the "reliability" of the confession as a condition of admissibility that it is unconstitutional. He cites no authority for his position, and this court has not found any. He argues furthermore that the Code section makes the confession admissible once the "featherweight" determination of voluntariness has been made for all purposes thereby creating an irrebuttable presumption of "reliability" in violation of the rule of *Sandstrom v. Montana*, 442 U.S. ___, 99 S.Ct. 2415, 61 L.Ed.2d 39 (1979). This enumeration is without merit. Code Ann. § 38-420.

Finally, the appellant argues that the state failed to carry its burden as to the motion to suppress and that the state did

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not prove the legality of his arrest which ultimately led to the appellant's confession. However, the legality of the arrest complained of had been adjudicated in the state's favor. *State v. High*, 145 Ga.App. 772, 244 S.E.2d 888 (1978).

SENTENCE REVIEW

[22] As required by Georgia Laws 1973, p. 159, et seq. [Code Ann. § 27-2537(c)(1-3)], we have reviewed the death sentence in this case. We have considered the aggravating circumstance found by the jury, the evidence concerning the crimes, and the defendant pursuant to the mandate of the statute. We conclude that the sentences of death imposed in this case were not imposed under the influence of passion, prejudice or any arbitrary factor.

The jury found the following aggravating circumstances as to Counts 1, 3, 4 and 5. "The offense of murder, armed robbery and kidnapping was outrageously or wantonly vile, horrible and inhuman in that it involved torture, depravity of mind, and an aggravated battery to the victim." Code Ann. § 27-2534.1(b)(7).

The evidence, if it is to be believed, shows that the appellant and his two co-indictees planned the armed robbery on the night in question with the express purpose of eliminating any witnesses to the crime. They abducted an eleven-year old child along with his stepfather at gunpoint. The victim was fifty-six inches tall and weighed seventy pounds. As they drove the victims to the execution site, the young boy rode inside the automobile with the appellant while his stepfather was locked in the trunk. The appellant in his statement said he thought the boy was too young, but he kept asking him as they rode, "Are you ready to die? Do you want to die? Well, you're going to die." He stated that the boy was begging for his life. Once the three robbers reached a rural area, the victims were removed from the car, marched around to the front of the automobile and forced to lie on their faces. They were then shot in the head in a coldblooded execution fashion. The murder victim's stepfather, however, was not fatally injured.

In that the sentence of death in this case rests upon findings of Code Ann. § 27-2534.1(b)(7), the jury's finding of that aggravating circumstance must be reviewed in light of the Supreme Court decision in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980); *Hance v. State*, 245 Ga. 856, 268 S.E.2d 339 (1980).

[23] Evidence of psychological abuse by the defendant to the victim before death where it is shown to have resulted in severe mental anguish to the victim in anticipation of physical harm may amount to serious physical abuse (i. e. torture to the victim) and will support a finding of depravity of mind of the defendant. *Hance v. State*, supra.

[24] In determining whether the evidence shows "depravity of mind," the age, and the physical characteristics of the victim may be considered. *Hance v. State*, supra; *Thomas v. State*, 245 Ga. 688, 266 S.E.2d 499 (1980). We find from the evidence in this case, that the serious psychological abuse by the appellant to the victim before death, especially in view of the victim's young age, and physical characteristics, supports beyond a reasonable doubt the jury's finding of torture and depravity of mind on the part of the appellant. We further find that this murder and kidnapping with bodily injury was outrageously or wantonly vile, horrible or inhuman in that it is distinguishable from ordinary murders and kidnapping with bodily injury for which the death penalty is not appropriate. While the victim died relatively instantaneously, he was a young child and not a member of the appellant's family. He was not subjecting the appellant to any emotional trauma nor giving the appellant any reason whatsoever to assault him. The appellant showed no remorse for the killing, but rather bragged that "he wanted to be the most famous black ringleader in the world." Under the evidence of this case, there is no doubt that the kidnapping and murder were of the type universally condemned by civilized societies as outrageously or wantonly vile or inhuman.

We find the evidence factually substantiates and supports the finding of this aggravating circumstance and the sentences of death by a rational trier of fact beyond a reasonable doubt *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We have thoroughly reviewed the instruction of the trial court during the sentencing phase of the trial and find that the charge was not subject to the defects dealt with in *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1978) and *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1978).

[25] As part of our independent review, although not enumerated as error, we note that the appellant received a death penalty for armed robbery from the person of Henry Phillips, Count 1 of the indictment, and kidnapping with bodily injury of Henry Phillips, Count 4 of the indictment. The death sentence received by appellant under Count 1 and Count 4 of the indictment must be set aside and remanded to the trial court with the direction that appellant be resentenced to life imprisonment as to Count 4 of the indictment, the only permissible punishment remaining under the kidnapping statute, and that the trial judge sentence appellant for the offense of armed robbery as provided by law. *Peek v. State*, 239 Ga. 422, 238 S.E.2d 12 (1977). We find no prejudice to the defendant by resentencing as to these counts or the reversal of the count in Division 12 herein as the evidence of such crimes was necessarily before the jury. *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979). In addition, we point out that we are here ordering the reduction of sentences and not the disallowance of an aggravating circumstance.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed for murder. The appellant by his own admission was the leader of the criminal enterprise and was an active participant in all aspects of the armed robbery, kidnapping, and murder of the victim. The kidnapping and murder was of a young child who had been taunted with the prospect of his own death while he was in the process of being abducted and taken to the execution site. We find that these similar cases set forth in the Appendix, in addition to those similar cases set forth in the Appendix to the companion case of *Ruffin v. State*, supra, support the affirmance of the death penalty. After careful review in considering both the crime and the defendant, we find no material difference between this case and the companion case of *Ruffin v. State*, supra, insofar as the imposition of the death penalty is concerned. Jose High's sentence to death for kidnapping with bodily injury in which the victim was murdered and murder is not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. See *Potts v. State*, supra.

Judgment affirmed in part, reversed in part, and vacated and remanded in part.

All the Justices concur, except that as to divisions 6, 8, & 12, HILL P. J., concurs in the judgment only.

GREGORY, J., not participating.

APPENDIX

1. *Ruffin v. State*, 243 Ga. 95, 252 S.E.2d 472 (1979)
2. *Fair v. State*, 245 Ga. 868, 268 S.E.2d 316 (1980)
3. *Patrick v. State*, 245 Ga. 417, 265 S.E.2d 553 (1980)
4. *Dampier v. State*, 245 Ga. 427, 265 S.E.2d 565 (1980)

   Addendum—245 Ga. 882, 268 S.E.2d 349 (1980)

(CHARGE OF THE COURT AS FOLLOWS)

THE COURT: Mr. Foreman and members of the jury, this, as I have heretofore indicated or stated to you, is the sentencing phase of this trial. It's very highly necessary that you listen to every word that the Court is now about to speak or to charge you at this time, and even so, Mr. Foreman, it may be well that you, if you are so prepared, to possibly take note if you desire, of some of the things the Court may tell you.

You will not be concerned in anywise in assessing or fixing a penalty as to Counts nos. 2 and 6--you will not fix any penalty whatever as to Count No. 2 which charges possession of firearm during commission of or attempt to commit the crime of armed robbery, nor to Count No. 6 which charges aggravated assault. You will not fix any penalty whatever as to those two counts.

Now, you have found the defendant guilty of the offenses of kidnapping as contained in Counts Nos. 3 and 4 of the bill of indictment and of the offense of murder as contained in Count No. 5 of the bill of indictment. It is now your duty to determine within the limits prescribed by law, the penalty that shall be imposed as punishment for those offenses. In reaching this determination, you are authorized to consider all of the evidence received by you in open court in the first phase

of the trial, including all mitigating facts and circumstances, if any, on behalf of the defendant. You are authorized to consider all of the facts and circumstances in the case. Under the law of this State, every person guilty of the offense of murder and/or kidnapping, when the victim is injured, shall be punished by life in the penitentiary or death by electrocution. The law provides, Mr. Foreman and ladies and gentlemen of the jury, for punishment either by death, life imprisonment, or imprisonment for a period of years, insofar as the charge of armed robbery is concerned as is contained in Count No. 1 of the bill of indictment. As to that charge and count, you would fix a sentence only if you find that the defendant should be punished by death or life imprisonment. If you do not find that the defendant should be punished by death or life imprisonment, you should show this by your verdict and the sentence would be then fixed by the Judge. In that case, the form of your verdict would be as to Count No. 1, "We, the jury, find that the defendant should receive less than a life sentence." In that case, your duty would be ended as to Count No. 1. If this is not your finding as to Count 1, you would apply the remaining instructions, which would be given to you, and determine whether the defendant should be punished by death or life imprisonment.

In reaching this determination, you are authorized to consider all of the evidence received by you in open court in the trial of the case. You are authorized to consider all of the facts and circumstances of the case including mitigating facts and circumstances, if any, on behalf of the defendant.

In the event that your verdict is life imprisonment, that is, as it applies to Counts Nos. 3 and 4 relating to kidnapping, the punishment the defendant would receive would be imprisonment in the penitentiary for and during the remainder of his natural life. If that be your verdict, you would add to the verdict already found by you an additional verdict as follows: "And we fix his punishment as life imprisonment."

As it applies to kidnapping when the victim is injured, you may, however, if you see fit and if that be your verdict, fix his punishment as death, which would require a sentence by the Court of death by electrocution. If that be your verdict, you would add to the verdict already found by you an additional verdict as follows: "And we fix his punishment as death."

I charge you that before you will be authorized to find a verdict fixing a sentence of death by electrocution, you must find evidence of statutory aggravating circumstances, as I will define to you later in the charge,

sufficient to authorize the supreme penalty of the law. I charge you that a finding of statutory aggravating circumstance or circumstances shall only be based upon evidence convincing your minds beyond a reasonable doubt as to the existance of one or more of the following factual conditions in connection with the defendant's perpetration of the act or acts for which you have found him guilty. They are (1) the offense of murder and/or armed robbery and/or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery; (2) the offense of murder and/or armed robbery and/or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

Now, the statutory instructions that you are authorized to consider will be submitted in writing to you for your deliberation. If you fix his punishment as death, you must also designate in writing the aggravating circumstances or circumstance which you found beyond a reasonable doubt. Your verdict should be agreed to by all twelve of your members. It must be in writing, entered under the instructions of the Court, dated and signed by your Foreman, and returned into Court for publication.

Now, the Court has prepared the necessary charge which it has referred to, in writing, and in addition to that fact the Court has caused to be placed thereon a verdict of the jury, and you may use this form itself or as your guide. It must be clear, concise, and specific. That is, the verdict--your findings and your recommendations as to these sentances in these cases. It is provided on the form that is prepared by the Court that you specify life imprisonment or specify the death penalty. I would charge you insofar as that is concerned that you specify the counts--whatever counts you may determine that he-- If you find that the life sentences should be imposed upon him, you must specify the counts as they are contained in the bill of indictment that he shall be sentenced for life upon. And if you find that he shall be sentenced to death, you must specify that the counts under which you sentance him to death, you would do it in the place provided here for that purpose.

Also, I charge you that if you recommend the death penalty as stated, you must recommend the counts under which you find and recommend the death penalty. You must state and set forth the aggravating circumstances which caused you or compelled you to inflict the death penalty as to whatever count or counts you might see fit to inflict such penalty.

Ample space is left in this form for you to write out and you must detail, if such be your findings, the aggravating circumstances which cause or compel you to affix the death penalty for that count or those counts which you think and determine he is entitled to receive.

After you shall have arrived at your verdict, Mr. Foreman, you would enter the verdict upon this form supplied to you by the Court, together with this charge; you would conform that verdict to the form which has been prepared; you would date it and sign it and you would then return it into Court.

You might now retire and commence your deliberations after you shall have received the indictment, the evidence adduced during the course of the trial--and I assume that it is still in the juryroom--and then determine the penalty or punishment that shall be imposed in this case.

(THE COURT CONFERS WITH COUNSEL AT THE BENCH)

You might now retire, as the Court has just instructed, back to the juryroom, and recommence your deliberations as to this phase after you shall have been handed the indictment together with this written charge of the Court.

(THE JURY RETIRES TO RECOMMENCE DELIBERATIONS)

(THE COURT CONFERS WITH COUNSEL OUTSIDE OF THE PRESENCE OF THE JURY)

THE COURT: Bring the jury back, please.

(THE JURY RE-ENTERS THE COURTROOM)

THE COURT: During the course of the charge, the Court overlooked one thing that it should have charged you, and I would now give it to you in charge and add it to what I have heretofore stated during the phase of this charge.

I charge you, members of the jury, that if you find that the State has proved one or more statutory aggravating circumstances beyond a reasonable doubt that you may recommend that the defendant receive a life sentence.

I neglected to tell you that and now I have charged it and now you may return to the juryroom and commence those deliberations.

(THE JURY ONCE AGAIN RETIRES TO RECOMMENCE DELIBERATIONS; TIME--9:45 P.M.)

(THE JURY RETURNS TO THE COURTROOM AT 11:15 p.m.)

THE COURT: Mr. Foreman, has the jury arrived at a verdict fixing punishment as to certain of these counts in this case?

FOREMAN: Yes sir.

THE COURT: Mrs. Darden, would you please pass that verdict to the Court?

(MRS. DARDEN, CLERK OF COURT, DOES AS REQUESTED)

THE COURT: Let the defendant stand. You might publish the verdict.

MRS. DARDEN, CLERK OF COURT: "We, the jury, recommend and fix the defendant's punishment on Counts 1, 3, 4 and 5 as follows: death. We further find the following aggravating circumstances, to-wit: the offense of murder and armed robbery and kidnapping was outrageously or wantonly vile, horrible, inhuman in that it involved torture, depravity of mind, and an aggravated battery to the victim. This the 1st day of December, 1978, Louis Patrick, Foreman."

THE COURT: Do you desire the jury be polled?

MR. RUFFIN: Yes sir.

THE COURT: Mr. Foreman, the verdict which has just been read by the Clerk of this Court, is that your verdict?

FOREMAN: Yes, it is.

THE COURT: Is it still your verdict?

FOREMAN: Yes, it is.

THE COURT: Is that your verdict?

SECOND JUROR: Yes, it is.

THE COURT: Is it still your verdict?

SECOND JUROR: Yes, it is.

THE COURT: Is that your verdict?

THIRD JUROR: Yes sir.

THE COURT: Is it still your verdict?
THIRD JUROR: Yes sir.
THE COURT: Is that your verdict?
FOURTH JUROR: Yes, it is.
THE COURT: Is it still your verdict?
FOURTH JUROR: Yes, it is.
THE COURT: Is that your verdict?
FIFTH JUROR: Yes sir.
THE COURT: Is it still your verdict?
FIFTH JUROR: Yes sir.
THE COURT: Is that your verdict?
SIXTH JUROR: Yes sir.
THE COURT: Is it still your verdict?
SIXTH JUROR: Yes sir.
THE COURT: Is that your verdict?
SEVENTH JUROR: Yes sir.
THE COURT: Is it still your verdict?
SEVENTH JUROR: Yes sir.
THE COURT: Is that your verdict?
EIGHTH JUROR: Yes sir.
THE COURT: Is it still your verdict?
EIGHTH JUROR: Yes sir.
THE COURT: Is that your verdict?
NINTH JUROR: Yes sir.
THE COURT: Is it still your verdict?
NINTH JUROR: Yes sir.

THE COURT: Is that your verdict?

TENTH JUROR: Yes sir.

THE COURT: Is it still your verdict?

TENTH JUROR: Yes sir.

THE COURT: Is that your verdict?

ELEVENTH JUROR: Yes, it is.

THE COURT: Is it still your verdict?

ELEVENTH JUROR: Yes, it is.

THE COURT: Is that your verdict?

TWELFTH JUROR: Yes sir.

THE COURT: And is it still your verdict?

TWELFTH JUROR: Yes sir.

THE COURT: Let that verdict be entered.

Jose M. High, the jury has found you guilty and you have heard the verdict of the jury fixing the punishment at death for the offenses or counts of armed robbery, kidnapping, second count of kidnapping, and that of murder. Is there anything you have to say before the Court imposes sentence upon you?

THE DEFENDANT: Yes sir.

THE COURT: All right.

DEFENDANT: I forgive them for they know not what they do.

THE COURT: Is there anything further you desire to say?

DEFENDANT: No sir.

THE COURT: Mr. Ruffin?

MR. RUFFIN: No sir, Your Honor.

THE COURT: The jury has made the determination as to the punishment in this case and thus it becomes incumbent upon the Court to impose that sentence or those sentences fixed by the jury.

It is ordered by the Court that you, Jose M. High, be taken from the bar of this court to the common jail for this county or to some other safe and secure place under such guard and protection as may be deemed necessary where you shall be safely and securely held until your removal therefrom to the custody of the Director of the State Department of Offender Rehabilitation for the purpose of the execution of this sentence in the manner prescribed by law.

It is further ordered by this Court that on the 19th day of January, 1979, that you, Jose M. High, shall be executed by the Director of the State Department of Offender Rehabilitation at such penal institution as may be designated by said officer and witnessed only by the executing officer, defendant's relatives, counsel, and such clergymen and friends as you may desire. It is further ordered that the Sheriff of Taliaferro County, together with such deputies as he may deem necessary--the number of guards to be approved by the presiding

judge or ordinary of said county--shall convey and deliver the said Jose M. High to the Director of the State Department of Offender Rehabilitation at such penal institution as may be designated by said Director, not more than twenty days and not less than two days prior to the time fixed herein for the execution of said condemned defendant, Jose M. High, and there delivered into the custody of the said Director.

It is further ordered that the said defendant, Jose M. High, on the day fixed herein between the hours of ten o'clock a.m. and two o'clock p.m. be, by the Director of the State Department of Offender Rehabilitation, electrocuted at the time and place and in the manner hereinprovided by law. And may God have mercy upon your soul.

As to that count charging you with possession of firearm during commission of or attempt to commit a crime, the Court sentences you to serve a term of five years--that being Count No. 2. As to Count No. 6 charging aggravated assault, the Court sentences you to serve a term of ten years to run consecutive with the sentence of five years just hereinbefore imposed.

Case is closed.

I might add this to the record in the case just to be sure that the record is thorough and complete-- I

charge you that if, during the course of your confinement you escape, you will be apprehended by the officers of the law, taken before a court of competent jurisdiction in the county wherein you escape and there, upon conviction of that offense, you will be subjected to confinement or imprisonment of not less than one nor more than five years. In the event you escape while in possession of an offensive weapon, upon conviction of that offense you will be subjected to additional confinement or imprisonment of not less than one nor more than ten years. I admonish you to be the very best prisoner in confinement.

If for any reason you are dissatisfied with the sentence which the Court imposed upon you as to Count No. 2, possession of firearm during the commission of or attempt to commit the crime of armed robbery, that in that case you have the right to an appeal to the Superior Court Sentence Review Panel. Such appeal might be perfected within a period of thirty days from this date by merely requesting in writing and handing same or delivering same to the Clerk of the Court, Mrs. Darden, the fact that--in writing--that you desire such appeal.

All right.

(THE TRIAL WAS THUS CONCLUDED)

SUBMITTED TO JURY IN WRITING:

I charge you that a finding of statutory aggravating circumstance or circumstances shall only be based upon evidence convincing your minds beyond a reasonable doubt as to the existence of one or more of the following factual conditions in connection with the defendant's perpetration of the act or acts for which you have found him guilty. They are:

1. The offense of murder, and/or armed robbery, and/or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery.

2. The offense of murder, and/or armed robbery, and/or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

We, the jury, recommend and fix the defendant's punishment as follows:

1. Life in prison
2. Death

If death is recommended, please complete the following:

We further find the following aggravating circumstances, to-wit:

We, the jury, recommend and fix the defendant's punishments on Counts 1, 3, 4, and 5 as follows:

Death

We further find the following aggravating circumstances, to-wit:

The offense of murder, and ~~for~~ armed robbery, and ~~for~~ Kidnapping was outrageously or wantonly vile, horrible and inhuman in that it involved torture, depravity of mind, and an aggravated battery to the victim.

This the 1st day of December, 1978.

Louis Patrick
FOREMAN

Georgia, Taliaferro County. 1st day
Filed in office this the ____ day
of December 1978 at 11:23 P.M.
Mary R. Parker
Clerk Superior Court
Minutes M - pg 310-311

25a

IN THE SUPERIOR COURT OF TALIAFERRO COUNTY

STATE OF GEORGIA

THE STATE OF GEORGIA

v.

JOSE MARTINEZ HIGH

Taliaferro County.
Filed this the 1st day
of May, 1978 at 9:45 A.M.
Mary A. Maddox
Clerk Superior Court

MOTION CHALLENGING THE CONSTITUTIONALITY OF GEORGIA CODE §27-2534.1

NOW COMES the defendant, JOSE MARTINEZ HIGH, by and through his undersigned counsel, and files this his motion challenging the constitutionality of the death penalty statute, and respectfully shows:

- 1 -

The defendant has been indicted by the grand jury of Taliaferro County, Georgia, on several felony charges, including the capital offense of Murder.

- 2 -

The defendant has been informed by the State, through the District Attorney, that it intends to invoke the death penalty statute for said offense.

- 3 -

The defendant alleges that the statute, Georgia Code §27-2534.1 is facially unconstitutional as well as unconstitutional in its application in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

The defendant alleges that the statute and its enforcement, Georgia Code §27-2534.1, amount to a Bill of Attainder and Ex Post Facto in violation of the Georgia Constitution, Georgia Code §2-302.

WHEREPORE, the defendant prays that this his motion be inquired into, and that the statute herein be declared unconstitutional, null and void.

This 1st day of December, 1978.

COUNSEL FOR DEFENDANT

JOHN H. RUFFIN, JR.
1101 ELEVENTH STREET
AUGUSTA, GEORGIA 30901

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in a properly addressed envelope with postage affixed thereon, and adequate to reach its destination, or by personally delivering a copy of same to opposing counsel.

This 1st day of December, 1978.

PERSON(S) SERVED:

Honorable Kenneth E. Goolsby
District Attorney
Toombs Judicial Circuit
Thomson, Georgia 30824

Report of The Trial Judge

of the

Superior Court of TALIAFERRO County, Georgia

The State vs. JOSE MARTINEZ HIGH
(A case in which the death penalty was imposed)

A. Data Concerning the Defendant

1. Name High Jose Martinez 2. Date of Birth 08 17 50
List, First Middle Mo. Day Yea

3. Social Security Number 260- 98 7026
4. Sex: M [X] 5. Marital Status: Never Married [X]
F [ ] Married [ ]
Divorced [ ]
Spouse Deceased [ ]

6. Children
(a) Number of children None
(b) Ages of children: 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18
(Circle age of each child)

7. Father living: yes [X] no [ ] If deceased, give date of death _____
8. Mother living: yes [X] no [ ] If deceased, give date of death _____
9. Number of children born to parents 3
10. Education--Highest Grade Completed: 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 [college
(Circle one)
11. Intelligence Level: (IQ below 70) Low [ ]
(IQ 70 to 100) Medium [ ]
(IQ above 100) High [X]

12. Psychiatric Evaluation Performed? Yes [ ] No [X]
If performed is defendant:
a. Able to distinguish right from wrong? [ ] [ ]
b. Able to adhere to the right? [ ] [ ]
c. Able to cooperate intelligently in his own defense [ ] [ ]
13. If examined, were character or behavior disorders found? Yes [ ] No [ ]
(If answer is yes please elaborate) _____

14. What other pertinent psychiatric [and psychological] information was reveal

15. Prior Work Record of Defendant:

	Type Job	Pay	Dates Held	Reason for Termination
a.	Unknown			
b.				
c.				
d.				
e.				

*A separate report must be submitted for each defendant sentenced to death.

B. Data Concerning the Trial

1. Was the case tried with or without jury? With [X] Without [ ]
2. How did the defendant plead? Guilty [ ] Not guilty [X]

C. Offense Related Data

1. Capital Offense for Which Penalty Imposed:
   a. Treason.....[ ]
   b. Murder.....[X]
   c. Kidnapping for Ransom.....[ ]
   d. Kidnapping where Injury Results.....[X]
   e. Aircraft Hijacking.....[ ]
   f. Rape.....[ ]
   g. Armed Robbery.....[X]

2. Were other offenses tried in the same trial? yes [X] no [ ]

   If other offenses were tried in the same trial list those offenses.

   a. Possession of firearm during commission of or attempt to commit the crime of armed robbery
   b. Aggravated Assault
   c. _____
   d. _____

3. If tried with jury, did the jury recommend the death sentence? Yes [X] No [ ]
4. Statutory aggravating circumstances found: Yes [X] No [ ]
5. Which of the following statutory aggravating circumstances were instructed and which were found?

	Instructed	Found
a. (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or	[ ]	[ ]
(2) The offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.	[ ]	[ ]
b. (1) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery or	[X]	[ ]
(2) The offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.	[ ]	[ ]
c. The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.	[ ]	[ ]

	Instructed	Found
d. The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.	[ ]	[ ]
e. The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.	[ ]	[ ]
f. The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.	[ ]	[ ]
g. The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.	[XX]	[XX]
h. The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.	[ ]	[ ]
i. The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.	[ ]	[ ]
j. The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.	[ ]	[ ]

6. List non-statutory aggravating circumstances indicated by the evidence, if any.

a. Elimination or attempt to eliminate the only witnesses

b. Tantalizing or taunting the boy before execution

c. _____

d. _____

7. Was there evidence of mitigating circumstances? Yes [ ] No [X]

8. If so, which of the following mitigating circumstances was in evidence?

a. The defendant has no significant history of prior criminal activity.	[ ]
b. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.	[ ]
c. The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.	[ ]
d. The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.	[ ]
e. The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.	[ ]

f. The defendant acted under duress or under the domination of another person. [ ]

g. At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication. [ ]

h. The youth of the defendant at the time of the crime. [ ]

i. Other. [ ]
Please explain if (i) is checked _____

_____

_____

9. If tried with a jury, was the jury instructed to consider the circumstances indicated in 8 as mitigating circumstances? Yes [X] No [ ]

10. Does the defendant's physical or mental condition call for special consideration? Yes [ ] No [X]

11. Although the evidence suffices to sustain the verdict, does it foreclose all doubt respecting the defendant's guilt? Yes [X] No [ ]

12. Was the victim related by blood or marriage to defendant? Yes [ ] No [X]

13. If answer is yes, what was the relationship? _____

_____

_____

14. Was the victim an employer or employee of defendant?
No [X]
Employer [ ]
Employee [ ]

15. Was the victim acquainted with the defendant?
No [X]
Casual Acquaintance [ ]
Friend [ ]

16. Was the victim local resident or transient in the community?
Resident [X]
Transient [ ]

17. Was the victim the same race as defendant? Yes [ ] No. [X]

18. Was the victim the same sex as the defendant? Yes [X] No [ ]

19. Was the victim held hostage during the crime?
No [ ]
Yes - Less than an hour [X]
Yes - More than an hour [ ]

20. Was the victim's reputation in the community:
Good [X]
Bad [ ]
Unknown [ ]

21. Was the victim physically harmed or tortured? Yes [X] No [ ]
If yes, state extent of harm or torture: Mental and Several gunshot wounds to the body

...at was the age of the victim? eleven

23. If a weapon was used in commission of the crime was it?

No weapon used	[ ]
Poison	[ ]
Motor Vehicle	[ ]
Blunt Instrument	[ ]
Sharp Instrument	[ ]
Firearm	[X]
Other _____	[ ]

24. Does the defendant have a record of prior convictions? Yes [ ] No [ ] Unknown

25. If answer is yes, list the offenses, the dates of the offenses and the sentences imposed:

Offense	Date of Offense	Sentence Imposed
a.		
b.		
c.		
d.		

26. Was there evidence the defendant was under the influence of narcotics or dangerous drugs at the time of the offense? Yes [ ] No [X]

27. Was the defendant a local resident or transient in the community?
Resident [ ]
Transient [X]

D. Representation of Defendant *

.. Date counsel secured Unknown

:. How was counsel secured? a. Retained by defendant's[X] Relatives
b. Appointed by Court [ ]

.. If counsel was appointed by court was it because
a. Defendant unable to afford counsel? [ ]
b. Defendant refused to secure counsel? [ ]
c. Other (explain) _____ [ ]

. How many years has counsel practiced law? a. 0 to 5 [ ]
b. 5 to 10[ ]
c. over 10[X]

. What is the nature of counsel's practice? a. Mostly civil [ ]
b. General [X]
c. Mostly criminal [ ]

.. Did the same counsel serve throughout the trial? Yes [X] No [ ]

. If not explain in detail. _____

(If more than one counsel served answer the above questions as to each counsel and attach to this report.)

E. General Considerations

1. Was race raised by the defense as an issue in the trial? Yes [ ] No [X]

2. Did race otherwise appear as an issue in the trial? Yes [ ] No [X]

3. What percentage of the population of your county is the same race as the defendant?

a. Under 10%.....[ ]
b. 10 to 25%.....[ ]
c. 25 to 50%.....[ ]
d. 50 to 75%.....[X]
e. 75 to 90%.....[ ]
f. Over 90%.....[ ]

4. Were members of defendant's race represented on the jury? Yes [X] No [ ]

5. If not, was there any evidence they were systematically excluded from the jury? Yes [ ] No [ ]

6. Was the jury instructed to exclude race as an issue? Yes [ ] No [X]

7. Was there extensive publicity in the community concerning this case? Yes [ ] No [X]

8. Was the jury instructed to disregard such publicity? Yes [X] No [ ]

9. Was the jury instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence? Yes [ ] No [X]

10. Was there any evidence that the jury was influenced by passion, prejudice, or any other arbitrary factor when imposing sentence? Yes [ ] No [XX]

11. If answer is yes, what was that evidence? _____

12. General comments of the Trial Judge concerning the appropriateness of the sentence imposed in this case The facts were horrible and vile. The effort was to exterminate two witnesses, but one lived. There was complete absence of remorse, etc. even through sentencing

F. Chronology of Case

		Elapsed Days
Date of Offense	07-27-76	
Date of Arrest	08-26-76	
Date Trial Began	11-28-78 - 12-1-78	3
Date Sentence Imposed	12-1-78	

5. Date post trial motions ruled on 6-19-80

6. Date Trial Judge's Report Completed 6-19-80

7. *Date Received by Supreme Court _____

8. *Date Sentence Review Completed _____

9. *Total Elapsed Days _____

* To be completed by Supreme Court

This report was submitted to the defendant's counsel for such comments as he desired to make concerning the factual accuracy of the report, and

1. His comments are attached (X)
2. He stated he had no comments ( )
3. He has not responded ( )

6-24-80
Date

Robert L. Douse
Judge, Superior Court of

Taliaferro County

FILED IN OFFICE COURT THIS 25th DAY OF June 1980
Geo. Mark D. Alden
CLERK OF SUPERIOR COURT, TALIAFERRO COUNTY, GA.

FILED IN OFFICE COURT THIS _____ DAY OF _____

LAW OFFICES
JOHN H. RUFFIN, JR.
BENJAMIN ALLEN
COLUMBUS GILMORE
1101 ELEVENTH STREET
AUGUSTA, GEORGIA 30901

TELEPHONE:
(404) 724-8891

REPLY TO
P. O. BOX 1625

June 20, 1980

(Dictated June 19, 1980)

Honorable Robert L. Stevens
Post Office Box 27
Thomson, Georgia 30824

Re: State of Georgia v. Jose Martinez High - Taliaferro County Superior Court

Dear Judge Stevens:

This letter is in response to your directive to respond to the Report of the Trial Judge in the captioned matter which is required in death penalty cases.

Part A - Data Concerning The Defendant

I believe that question fourteen (14) should be answered as "unknown" rather than leaving it blank.

Part C - Offense Related Data

I believe that question nine (9) should be answered "no" rather than "yes" as you indicate on the report. Since no psychological or psychiatric evaluation was made on the defendant, I believe that the most appropriate answer would be "unknown".

Question eleven (11) calls for a judgment, and in my judgment the evidence does not foreclose all doubt respecting the defendant's guilt. I believe that the victim's reputation in the community was unknown also.

Part E - General Considerations

No. 2 - With respect to question two (2), race did appear as an issue during the jury selection process.

No. 5 - I believe that blacks were systematically excluded by the use of peremptory challenges exercised by the District Attorney.

No. 7 - I believe that there was extensive publicity in the community concerning this case, as was brought out on voir dire; accordingly, I believe that "yes" is a more appropriate answer.

No. 8 - I do not believe that the jury was specifically instructed to disregard publicity, but it was instructed to decide the case based upon the evidence.

No. 10 - I believe there was evidence that the jury was influenced by passion, prejudice, or any other arbitrary factor when it imposed the sentence. You will recall that several jurors indicated that they had already decided what punishment should be meted out.

Finally, with respect to question twelve (12), there was nothing to indicate the presence of absence of remorse, other than what subjective judgment you may have made while observing the defendant seated at the counsel table and when he appeared before the court for sentencing.

Sincerely yours,

John H. Ruffin, Jr.

JHR JR/gfl

FILED IN OFFICE FOURTH 25th
9am Mary R. Holden
CLERK OF SUPERIOR COURT, TALLIAFERRO COUNTY, GA.

ORIGINAL

NO. 80-6843

RECEIVED
JUL 13 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JOSE MARTINEZ HIGH,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
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Senior Assistant
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10

QUESTIONS PRESENTED

1.

Whether the Georgia Supreme Court's decision that serious psychological abuse of the victim supported the jury's finding of torture and depravity of mind as an aggravating circumstance under Ga. Code Ann. § 27-2534.1(b)(7), is in conflict with this Court's decision in Godfrey v. Georgia?

2.

Whether it is necessary to conduct a new sentencing hearing when the jury was correctly instructed in the entirety of Ga. Code Ann. § 27-2534.1(b)(7), and the Supreme Court of Georgia affirmed Petitioner's death sentence imposed pursuant to a finding under Ga. Code Ann. § 27, 2534.1(b)(7), in light of Godfrey v. Georgia?

3.

Whether Petitioner's sentence of death constitutes cruel and unusual punishment under the Eighth Amendment solely because he was seventeen years old at the time of the offense, when under Georgia law, he was an adult?

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NO. 80-6843

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JOSE MARTINEZ HIGH,

Petitioner,

v.

STATE OF GEORGIA,

Respondent

PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

On December 1, 1978, the Petitioner, Jose Martinez High, was tried by jury in the Superior Court of Taliaferro County for the offenses of murder, two counts of kidnapping with bodily injury, armed robbery, possession of a firearm during the commission of a crime and aggravated assault. Petitioner was convicted of all charges and sentenced to death for armed robbery, murder and two counts of kidnapping. On appeal, the Supreme Court of Georgia vacated two of the four death sentences, those being the armed robbery and kidnapping of the victim who survived the execution attempt on his life. The Court upheld the jury's finding under Ga. Code Ann. § 27-2534.1(b)(7), for the murder of Bonnie Bulloch.

From the Supreme Court of Georgia's decision of February 24, 1981, affirming Petitioner's death sentence, this petition for a writ of certiorari has followed. The facts of this case are adequately set forth in the Supreme Court of Georgia's opinion under the division entitled "Sentence Review", which opinion is attached hereto as Respondent's Appendix A.

PART TWO

ARGUMENT AND CITATION OF AUTHORITY

A. THE GEORGIA SUPREME COURT'S FINDING THAT SERIOUS PSYCHOLOGICAL ABUSE OF THE VICTIM SUPPORTED THE JURY'S FINDING OF TORTURE AND DEPRAVITY OF MIND AS AN AGGRAVATING CIRCUMSTANCE UNDER GA. CODE ANN. § 27-2534.1(b)(7), IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN GODFREY V. GEORGIA, 446 U.S. 420 (1980).

The jury in Petitioner's trial found the following aggravating circumstance: "The offense of murder, armed robbery, and kidnapping was outrageously or wantonly vile, horrible and inhuman in that it involved torture, depravity of mind, and aggravated battery to the victim." The Georgia Supreme Court in conducting its sentence review in light of this Court's decision in Godfrey v. Georgia, supra found:

> "We find from the evidence in this case, that the serious psychological abuse by the appellant to the victim before death, especially in view of the victim's young age, and physical characteristics, supports beyond a reasonable doubt the jury's finding of torture and depravity of mind on the part of the appellant. We further find that this murder and kidnapping with bodily injury was outrageously or wantonly vile, horrible or inhuman in that it is distinguishable from ordinary murders and kidnapping with bodily injury for which the death penalty is not appropriate.

> While the victim died relatively instantaneously, he was a young child and not a member of the appellant's family. He was not subjecting appellant to any emotional trauma nor giving the appellant any reason whatsoever to assault him. The appellant showed no remorse for the killing, but rather bragged that 'he wanted to be the most famous black ring leader in the world.' Under the evidence of this case, there is no doubt that the kidnapping and murder were the type universally condemned by civilized societies as outrageously or wantonly vile or inhuman."

Petitioner now contends that "torture" as delineated in Hance v. State, 245 Ga. at 861, 268 S.E.2d 339 (1980), cert. denied __ U.S. __, 191 S.Ct. 796 (1980), and as applied in the present case, is given a broader meaning than commonly understood, to include a situation wherein the victim "briefly" anticipates death. (Petitioner's brief at p. 10). Yet, the facts in Petitioner's case amply show the eleven year old victim was taunted with his impending doom while being transported by Petitioner approximately a mile to the execution site, and during this "brief" period, begged for his life. Bonnie Bulloch did not briefly anticipate his death, rather due to the Petitioner's actions, the child was confronted with the horror of his demise repeatedly. Respondent respectfully submits that the spector of a child crying out for his life, in response to Petitioner's repeated acclamations that the child would be killed while in route to the execution site does not constitute a brief period of time in the case under consideration.

The Supreme Court of Georgia's definition of torture in Hance v. State, supra requires evidence of psychological abuse to the victim resulting in severe mental anguish in anticipation of physical harm, which amounts to the equivalent of serious physical abuse. Torture evidencing depravity of mind, through the infliction of psychological abuse has been all too well demonstrated by various tyrannical regimes during this century. The Respondent respectfully submits that this Court requires no recitation of examples to demonstrate that intentional infliction of psychological abuse is often the effective equivalent of physical abuse in its end result upon a victim. The Georgia Supreme Court correctly recognized this form of torture, stating:

> "Evidence of psychological abuse by the defendant o the victim before death where it is shown to have resulted in severe mental anguish to the victim in anticipation of physical harm may amount to serious physical abuse (i.e., torture of the victim), and also will support a finding of depravity of mind of the defendant."

Hance, supra at 861.

The Supreme Court of Georgia in its sentence review carefully set forth the facts upon which the findings of depravity of mind and torture by the jury were substantiated beyond a reasonable doubt. Contrary to Petitioner's contention, the case under consideration is well within the "core" cases under Section (b)(7). The victim was a young child, not a member of Petitioner's family, and was ruthlessly executed after being forced to beg for his life. Thus, contrary to Petitioner's contentions, the evidence produced at trial amply

supports the jury's finding of the Section (b)(7) aggravating circumstance. Accordingly, the opinion of the Supreme Court of Georgia in Petitioner's case is not in conflict with this Court's decision in Godfrey v. Georgia.

B. THE PETITIONER IS NOT ENTITLED TO A NEW SENTENCING HEARING AS THE JURY WAS CORRECTLY INSTRUCTED AND THE SUPREME COURT OF GEORGIA PROPERLY AFFIRMED PETITIONER'S DEATH SENTENCE IMPOSED PURSUANT TO A FINDING UNDER GA. CODE ANN. § 27-2534.1(b)(7), IN LIGHT OF GODFREY V. GEORGIA, 446 U.S. 420 (1980).

Contrary to Petitioner's contention, no requirement exists under Godfrey v. Georgia, that the present case under consideration be remanded to the trial court for a new sentencing hearing. Unlike the facts in Godfrey, the jury in Petitioner's case made a complete finding under Section (b)(7) of the aggravating circumstances underlying its recommendation of the death sentence. Further, the trial court instructed the jury in the language of Section (b)(7) in its entirety. In Godfrey, the jury had based its recommendation only upon a partial finding of first subpart of Section (b)(7), without specifying the basis for its decision that the murder had been "outrageously or wantonly vile, horrible and inhuman".

The wording of the jury's finding in the Petitioner's case was sufficiently definite to provide a basis for adequate sentence review by the Supreme Court of Georgia. The absence of definitive terminology as to the meaning of the terms within Section (b)(7), in the trial court's instruction does not constitute a basis for rehearing. The finding of torture and depravity of mind by the jury leaves no doubt as to the basis upon which the jury found the murder to fall within the first part of Section (b)(7). The Supreme Court Georgia in conducting its sentence review, was not required to engage in speculation as to the jury's

findings, and the court had before it the benefit of this Court's opinion in Godfrey.

Therefore, this Court can determine that the absence of explanatory definitions as to the meaning of individual terms contained within Section (b)(7), did not deprive the Petitioner of any of his constitutional or statutory rights. A new sentencing hearing is not required in Petitioner's case as Section (b)(7) was constitutionally applied to the specific facts of this case, and the Supreme Court of Georgia properly reviewed the sentence pursuant to Ga. Code Ann. § 27-2537(c).

C. PETITIONER'S SENTENCE OF DEATH DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT SOLELY BECAUSE PETITIONER WAS SEVENTEEN YEARS OLD AT THE TIME OF THE OFFENSE AS UNDER GEORGIA LAW, HE WAS AN ADULT.

Petitioner for the first time on this petition for a writ of certiorari, specifically contends that his sentence of death constitutes cruel and unusual punishment under the Eighth Amendment solely because Petitioner was seventeen years old at the time of the murder he committed. Because neither this allegation, nor any evidence in support of the same has ever been squarely presented to the state courts for resolution, this allegation cannot serve as a basis for the granting of the request of certiorari. Cardinale v. Louisiana, 394 U.S. 437 (1969).

Notwithstanding the fact that this untimely allegation cannot serve as the basis for granting of the requested writ, Respondent notes with interest Petitioner's characterization of himself as a child, and of his death sentence as a pending child execution. Contrary to Petitioner's assertions, however, under Georgia law, Petitioner was not a child, nor a juvenile, but rather an adult at the time of the murder of the victim, Bonnie Bulloch, an eleven year old boy. Ga. Code Ann. § 24A-401(c).

Further, while Petitioner contends that this court should grant the requested writ in order that this untimely issue might be considered in conjunction with Eddings v. Oklahoma, Case No. 80-5727, Respondent notes that the defendant in Eddings, supra, was a sixteen year old juvenile at the time of the vicious murder he committed, not an adult as was Petitioner.

Further, as noted by the court in Eddings v. Oklahoma, 616 P.2d 1159 (Okla. Crim. 1980, citing Gregg v. Georgia, 428 U.S. 153 (1976), capital punishment is not abhored by public sentiment, which fact is evidenced by the inactment of state legislatures of new capital sentencing statutory schemes. Thus, the imposition of the death sentence upon this Petitioner, who was an adult at the time of the murder he committed, does not constitute cruel and unusual punishment.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia as it is manifest that no substantial federal question not previously decided by this Court is presented and the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court.

Please serve:

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Respectfully submitted,

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CHARLES E. BROWN
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In the Supreme Court of Georgia

Decided: FEB 24 1981

36689. JOSE M. HIGH v. THE STATE

CLARKE, Justice

The appellant, Jose Martinez High, was tried by a jury in the Superior Court of Taliaferro County for the offenses of murder, two counts of kidnapping with bodily injury, armed robbery, possession of a firearm during the commission of a crime and aggravated assault. He was convicted of all charges and sentenced to death for armed robbery, murder and two counts of kidnapping. The appellant was also sentenced to five years imprisonment on the charge of possession of a firearm during the commission of a crime and ten years imprisonment on the aggravated assault charge. The case is here on direct appeal and for mandatory review of the death sentences imposed. The facts surrounding the crimes charged and the death of the young victim are amply set out in the companion case of Ruffin v. State, 243 Ga. 95 (252 SE2d 472) (1979), and will not be repeated here.

ENUMERATIONS OF ERROR

1. The defendant was not denied due process of law as claimed by the preemptory striking of some black potential traverse jurors. Swain v. Alabama, 380 U.S. 202 (85 SC 824, 13 LE2d 759) (1965); Taylor v. State, 243 Ga. 222 (253 SE2d 191) (1979), see also Willis v. State, 243 Ga. 185 (253 SE2d 10) (1979); Jones v. State, 243 Ga. 820 (256 SE2d 907) (1979).[1/]

2. Appellant's attorney upon motion sought funds to hire investigators and obtain expert witnesses. The only evidence presented by the appellant in support of his motion was as to the size of the district attorney's staff, the resources available

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[1/] We note that four of the twelve petit jurors selected were black and one of the two alternates selected was black.

to the district attorney, and the amount of salaries paid to the district attorney and his staff. The state presented evidence that the appellant was represented by a retained attorney who was assisted by two paid law student interns supplied by the Southern Poverty League. Expert testimony was not crucial to the state's case and no showing was made as to the need for expert testimony on behalf of the appellant. "The granting or denial of a motion for appointment of expert witnesses lies within the sound discretion of the trial court and unless there has been an abuse of discretion, the trial court's ruling would be upheld." Patterson v. State, 239 Ga. 409 (3) (238 SE2d 2) (1977). The appellant has made no showing of prejudice and his second enumeration is therefore without merit. Whitaker v. State, 246 Ga. 163 (269 SE2d 436) (1980).

3. Thirty-two potential jurors of appellant's race were excluded for cause under Witherspoon during the voir dire process. Appellant moved for a continuance to secure additional members of his race for possible jury service. The trial court denied the motion and the appellant asserts error.

When it became apparent that it was necessary to impanel additional jurors because of the number of jurors who were challenged for cause, the trial court drew additional names from the jury box to fill the deficit. Appellant makes no contention that the persons selected were not competent veniremen properly drawn to sit on the panel. Nor does he contend that the jury list was improperly constituted. "A defendant is entitled to array of properly drawn impartial jurors to which he may direct his preemptory challenges. Franklin v. State, 245 Ga. 141 (263 SE2d 666) (1980). A party is entitled to this as a matter of right; but, conversely, he is entitled to no more." Dampier v. State, 245 Ga. 427 (263 SE2d 666) (1980). Appellant's third enumeration is without merit. Taylor v. Louisiana, 419 U.S. 522 (95 SC 692, 42 LE2d 690) (1975).

4. In his fourth enumeration of error, the appellant contends that the trial court erred in failing to grant his motion

for new trial. We do not agree.

We find upon review of the evidence in light most favorable to the verdict, a rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (99 SC 2781, 61 LE2d 560) (1979). Sentence review ante. At trial, the surviving victim, Henry Phillips positively identified the defendant as being one of the three persons who robbed the gasoline station and subsequently shot him and his stepson. The witness testified that the appellant was the person who pointed a pistol in his face immediately after the three robbers drove into the station and asked for gas. He further testified that the station was well lit.

The appellant contends that the trial court erred in permitting the witness to identify the defendant at trial in that an adequate basis for determining the reliability of such identification was lacking. He bases this contention upon the witness' wearing of glasses and excited state during the crime. However, these factors go to the witness' credibility and the weight of his testimony and not to the admissibility of his testimony. See Watkins v. Sowders, ___U.S.___ (Case No. 79-5949 decided January 13, 1981; 28 CRL 3037); Gresham v. State, 246 Ga. 574 (___SE2d___) (1980). The record in this case simply does not support a contention that the identification procedure was impermissibly suggestive. Thomas v. State, 245 Ga. 688 (267 SE2d 253) (1980); McClesky v. State, 245 Ga. 108 (263 SE2d 146) (1980); Burrell v. State, 239 Ga. 792 (239 SE2d 11) (1977).

5. At the call of the case and prior to a jury being impaneled but in the presence of the veniremen, the trial court ruled on the appellant's motion for in camera inspection. The trial court stated in its ruling that it found nothing exculpatory or favorable to the defendant in the files of the district attorney. Appellant then moved for a dismissal of the indictment

or in the alternative to continue the case until such time as a new panel which had not heard the court's ruling could be obtained. The court overruled the objection and instructed all members of the jury panel present in the courtroom that they were not to be concerned with the rulings of the court in that such rulings were not an expression of opinion by the court of the facts of the case.

The appellant argues that the ruling of the trial court amounted to an impermissible expression of opinion prohibited by Code Ann. § 81-1104. We do not agree. It is clear from the record that the trial judge was not expressing an opinion but ruling upon the motion which had been made by the appellant. Wright v. State, 223 Ga. 849 (159 SE2d 76) (1968). See Tucker v. State, 245 Ga. 68 (263 SE2d 109) (1980); Whisman v. State, 221 Ga. 460 (145 SE2d 499) (1965).

6. It is clear from the voir dire examination that the jurors excused for being conscientiously opposed to the death penalty were "irrevocably committed before the trial began to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings. Witherspoon v. Illinois, 391 U.S. 510 (88 SC 1770, 20 LE2d 776) (1968); Thomas v. State, 245 Ga. 688 (267 SE2d 253) (1980); Davis v. Georgia, 429 U.S. 122 (97 SC 399, 50 LE2d 399) (1977); Corn v. State, 240 Ga. 130 (240 SE2d 694) (1977).

While not raised as error, as in part of our independent review, we have noted that a juror was excused over objection by the trial court on the grounds that she was incompetent to serve. During voir dire, the prospective juror, in responding to the trial court's inquiry, stated that she could not understand the questions of a most elementary nature that were propounded by either the defense counsel or counsel for the state. It was evident that this juror could not understand the nature of the

proceedings, and we find no error in the court upon its own motion excusing her. Code Ann. § 59-106. Welch v. State, 237 Ga. 665 (229 SE2d 390) (1976); Patterson v. State, supra. See Barrow v. State, 239 Ga. 162 (236 SE2d 257) (1977).

The appellant argues that the trial court erred in refusing to allow him to question each prospective juror on voir dire outside the presence of the other jurors. Such matters are necessarily within the sound discretion of the trial court. Finney v. State, 242 Ga. 582 (250 SE2d 388) (1978); Green v. State, ___ Ga. ___ (Case No. 36115, decided October 7, 1980). We find upon review of voir dire that the trial court did not abuse its discretion in denying the appellant's motion especially in view of the trial court's instructions to the panel that the questions of counsel were merely aids in selecting an impartial jury and that members of the panel were to give no consideration whatsoever to what was said during voir dire, insofar as the trial of the case was concerned. Nor has the defendant shown "substantial prejudice" by the court's failure to allow sequestered voir dire. Duckworth v. State, ___ Ga. ___ (Case No. 36612, decided November 5, 1980).

The appellant contends that the trial judge abused his discretion in limiting voir dire examination of prospective jurors. We do not agree. The trial judge upon proper objection refused to allow the examination of veniremen with regard to burden of proof, reasonable doubt and questions of evidence. These were technical legal questions and therefore prohibited. Stack v. State, 234 Ga. 19 (214 SE2d 514) (1975); Cobb v. State, 244 Ga. 344, (260 SE2d 60) (1979). Likewise, defense counsel was prohibited from asking questions which were attempts to obtain a prejudgment of his case, which is impermissible. Pinion v. State, 225 Ga. 36 (165 SE2d 708) (1969); Cobb v. State, supra.

The trial court did not err in allowing the state to qualify the prospective jurors as to kinship with the other two co-defendants. Contrary to appellant's argument, such qualification could-

not have prejudiced appellant as the participation of the co-defendants in the crime was a necessary part of the state's proof.

7. During opening argument, the district attorney introduced himself by saying in part, "I've been your district attorney for the last nineteen years." The appellant's attorney objected as he objected to other remarks of the district attorney throughout the trial as improper argument. The record simply does not support the contention of appellant that the remarks of the district attorney were made with disturbing frequency or made a mockery of the proceeding. In each instance the trial court admonished the district attorney concerning any improper argument. This enumeration is without merit. See Watkins v. State, 237 Ga. 678 (229 SE2d 465) (1976); Dorris v. State, 237 Ga. 837 (229 SE2d 638) (1976); Phears v. State, 236 Ga. 660 (225 SE2d 4) (1976); Shirley v. State, 245 Ga. 616 (266 SE2d 218) (1980).

8. The appellant contends that the trial court erred in permitting state's witnesses to remain in the courtroom after the rule of sequestration had been invoked. This same argument was raised in Ruffin v. State, supra, and decided adversely to appellant's position. The district attorney requested that the chief investigating officer remain in the courtroom in order to assist the state in the presentation of its case. The sheriff was allowed to remain in the courtroom in his official capacity. Hardy v. State, 245 Ga. 272 (264 SE2d 209) (1980); Hardy v. State, 245 Ga. 673 (266 SE2d 489) (1980); O'Dillon v. State, 245 Ga. 342 (265 SE2d 18) (1980). See Dampier v. State, 245 Ga. 427 (265 SE2d 565) (1980).

9. The appellant argues that the trial court erred in admitting certain items into evidence. These items included photographs of the co-conspirators, the guns of the co-conspirators, tires and tire prints from the car used in the robbery, evidence of fingerprints taken from the automobile used in the robbery

and the money tray which was found after the crime. Evidence of the weapons used by the co-defendants, the car driven by the co-defendants with their fingerprints located thereon and photographs of the co-defendants were properly admitted as part of the state's proof as to the conspiracy to rob the service station and kill the witnesses. See Ruffin v. State, supra. The gist of appellant's objection to the introduction of the money tray, tires and tire prints is that they were not positively identified as the money tray which came from the service station and that the witnesses could not positively testify that the tire prints were made by the tires found on the automobile used in the robbery. However, the state introduced evidence to show that the money tray was either the money tray in the service station or one identical to it and that the tires were of the same brand and type as the tires which made the prints taken from the scene. The trial court did not err in admitting such evidence. Patterson v. State, 233 Ga. 724 (213 SE2d 612) (1975). See Ruffin v. State, supra.

10. The appellant contends that the trial court erred in admitting the testimony of agent Monahan of the G.B.I. in that such testimony was hearsay. We do not agree. The agent testified that he observed Dr. Carrington at the university hospital emergency room remove a projectile from the wrist of one of the victims, and he took custody of that projectile. Such testimony is not hearsay.

11. The appellant contends that the trial court erred in imposing the sentence of death in that under the Georgia statute as applied, there is a substantial risk that the death penalty will be inflicted in an aribtrary and capricious manner. This argument has been raised before and decided adversely to the appellant's position. Gregg v. Georgia, 228 U.S. 153 (96 SC 2909, 49 LE2d 859) (1976); Hance v. State, 245 Ga. 856 (268 SE2d 339) (1980); Cape v. State, ___ Ga. ___ (Case No. 36298, decided October 7, 1980).

12. The appellant alleges that Count 1, armed robbery, merged with Count 2, possession of a firearm during the commission of a crime. We agree. Where one is charged with armed robbery and a separate crime of possession of a firearm during the commission of a crime, the possession count may or may not be included in the greater crime of armed robbery. Whereas here, the evidence discloses that the crime of armed robbery was committed with the same firearm as that for which the appellant is charged with possessing, the lesser crime of possession of a firearm during the commission of a crime is included in the greater crime of armed robbery. Roberts v. State, 228 Ga. 298 (185 SE2d 385) (1971); Crumbley v. State, 235 Ga. 540 (221 SE2d 13) (1975); Code Ann. § 26-506. However, Count 6, aggravated assault upon the person of Henry Phillips, does not merge as a matter of law or fact with Count 1, armed robbery. Roberts v. State, supra. Furthermore, under the evidence of this case, the kidnapping of Bonnie Bulloch with bodily injury did not merge as a matter of law or a matter of fact with the armed robbery of the service station.

Appellant contends under Code Ann. § 26-506 the evidence of the murder, Count 5 of the indictment, cannot be used as the basis for the separate conviction of the murder count and also to authorize a conviction of kidnapping with bodily injury to the murder victim. Allen v. State, 233 Ga. 200 (210 SE2d 680) (1974); Presnell v. State, 241 Ga. 49 (243 SE2d 496) (1978). See State v. Estevez, 232 Ga. 316 (206 SE2d 475) (1974). The kidnapping indictment in this case alleges the bodily injury to be the murder of the victim. In Potts v. State, 241 Ga. 67 (243 SE2d 510) (1978), the defendant was convicted for the murder of Michael Priest and kidnapping with bodily injury of Michael Priest. The bodily injury alleged was the killing of the victim. We held in Potts that as a matter of fact, as well as a matter of law, the murder of the victim and the kidnapping of the victim

with bodily injury were not included offenses so as to bar the defendant from being prosecuted and subsequently convicted of both crimes. This conclusion was reached because neither of the crimes could have been established by proof of the same or less than all of the facts required to establish the commission of the crime charged. Code Ann. § 26-505(a). The murder required a finding of malice aforethought but the kidnapping required no such finding. The kidnapping required a finding of unlawful abduction, while such a finding is not necessary for the conviction for murder. We here follow the rule established in Potts and hold that the conviction and sentence of death for murder and kidnapping with bodily injury must be affirmed.

The same rationale does not apply to the conviction for kidnapping with bodily injury and the conviction for aggravated assault of Henry Phillips. This is true because the elements of the crime of aggravated assault must have been proven in order to sustain a conviction for the crime of kidnapping with bodily injury. Therefore, the aggravated assault in this case is an included offense of the crime of kidnapping with bodily injury and the conviction for aggravated assault, Count 6 of the indictment, is reversed. Williams v. State, 238 Ga. 244 (232 SE2d 238) (1977).

In his last enumeration of error, the appellant urges that Code Ann. § 38-411 is unconstitutional on its face and in its application in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. That Code section reads as follows: "To make a confession admissible it must have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury." The appellant argues that because the statute on its face or as applied does not provide for a determination of the "reliability" of the confession as a condition of admissibility that it is unconstitutional. He cites no authority for his position, and this court has not found any. He argues furthermore that th

Code section makes the confession admissible once the "feather-weight" determination of voluntariness has been made for all purposes thereby creating an irrebuttable presumption of "reliability" in violation of the rule of Sandstrom v. Montana, 442 U.S. 510 (99 SC 2415, 61 LE2d 39) (1979). This enumeration is without merit. Code Ann. § 38-420.

Finally, the appellant argues that the state failed to carry its burden as to a motion to suppress and that the state did not prove the legality of his arrest which ultimately led to the appellant's confession. However, the legality of the arrest complained of had been adjudicated in the state's favor. State v. High, 145 Ga.App. 772 (244 SE2d 888) (1978).

SENTENCE REVIEW

As required by Georgia Laws 1973, p. 159, et seq. [Code Ann. § 27-2537(c)(1-3)], we have reviewed the death sentence in this case. We have considered the aggravating circumstance found by the jury, the evidence concerning the crimes, and the defendant pursuant to the mandate of the statute. We conclude that the sentences of death imposed in this case were not imposed under the influence of passion, prejudice or any arbitrary factor.

The jury found the following aggravating circumstance as to Counts 1, 3, 4 and 5. "The offense of murder, armed robbery and kidnapping was outrageously or wantonly vile, horrible and inhuman in that it involved torture, depravity of mind, and an aggravated battery to the victim." Code Ann. § 27-2534.1(b)(7).

The evidence, if it is to be believed, shows that the appellant and his two co-indictees planned the armed robbery on the night in question with the express purpose of eliminating any witnesses to the crime. They abducted an eleven-year old child along with his stepfather at gunpoint. The victim was fifty-six inches tall and weighed seventy pounds. As they drove the victims to the execution site, the young boy rode inside the automobile with the appellant while his stepfather was locked in the trunk. The appellant in his statement said he thought the boy was too

young, but he kept asking him as they rode, "Are you ready to die? Do you want to die? Well, you're going to die." He stated that the boy was begging for his life. Once the three robbers reached a rural area, the victims were removed from the car, marched around to the front of the automobile and forced to lie on their faces. They were then shot in the head in a coldblooded execution fashion. The murder victim's stepfather, however, was not fatally injured.

In that the sentence of death in this case rests upon findings of Code Ann. § 27-2534.1(b)(7), the jury's finding of that aggravating circumstance must be reviewed in light of the Supreme Court decision in Godfrey v. Georgia, 446 U.S. 420 (100 SC 1759, 64 LE2d 398) (1980); Hance v. State, 245 Ga. 856 (268 SE2d 339) (1980).

Evidence of psychological abuse by the defendant to the victim before death where it is shown to have resulted in severe mental anguish to the victim in anticipation of physical harm may amount to serious physical abuse (i.e. torture to the victim) and will support a finding of depravity of mind of the defendant. Hance v. State, supra.

In determining whether the evidence shows "depravity of mind," the age, and the physical characteristics of the victim may be considered. Hance v. State, supra; Thomas v. State, 245 Ga. 688 (266 SE2d 499) (1980). We find from the evidence in this case, that the serious psychological abuse by the appellant to the victim before death, especially in view of the victim's young age, and physical characteristics, supports beyond a reasonable doubt the jury's finding of torture and depravity of mind on the part of the appellant. We further find that this murder and kidnapping with bodily injury was outrageously or wantonly vile, horrible or inhuman in that it is distinguishable from ordinary murders and kidnapping with bodily injury for which the death penalty is not appropriate. While the victim died relatively instantaneously, he was a young child and not

a member of the appellant's family. He was not subjecting the appellant to any emotional trauma nor giving the appellant any reason whatsoever to assault him. The appellant showed no remorse for the killing, but rather bragged that "he wanted to be the most famous black ringleader in the world." Under the evidence of this case, there is no doubt that the kidnapping and murder were of the type universally condemned by civilized societies as outrageously or wantonly vile or inhuman.

We find the evidence factually substantiates and supports the finding of this aggravating circumstance and the sentences of death by a rational trier of fact beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (99 SC 2781, 61 LE2d 560) (1979). We have thoroughly reviewed the instruction of the trial court during the sentencing phase of the trial and find that the charge was not subject to the defects dealt with in Fleming v. State, 240 Ga. 142 (240 SE2d 37) (1978) and Hawes v. State, 240 Ga. 327 (240 SE2d 833) (1978).

As part of our independent review, although not enumerated as error, we note that the appellant received a death penalty for armed robbery from the person of Henry Phillips, Count 1 of the indictment, and kidnapping with bodily injury of Henry Phillips, Count 4 of the indictment. The death sentence received by appellant under Count 1 and Count 4 of the indictment must be set aside and remanded to the trial court with the direction that appellant be resentenced to life imprisonment as to Count 4 of the indictment, the only permissible punishment remaining under the kidnapping statute, and that the trial judge sentence appellant for the offense of armed robbery as provided by law. Peek v. State, 239 Ga. 422 (238 SE2d 12) (1977). We find no prejudice to the defendant by resentencing as to these counts or the reversal of the count in Division 12 herein as the evidence of such crimes was necessarily before the jury. Collier v. State, 244 Ga. 553 (261 SE2d 364) (1979). In addition, we

point out that we are here ordering the reduction of sentences and not the disallowance of an aggravating circumstance.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed for murder. The appellant by his own admission was the leader of the criminal enterprise and was an active participant in all aspects of the armed robbery, kidnapping, and murder of the victim. The kidnapping and murder was of a young child who had been taunted with the prospect of his own death while he was in the process of being abducted and taken to the execution site. We find that these similar cases set forth in the Appendix, in addition to those similar cases set forth in the Appendix to the companion case of Ruffin v. State, supra, support the affirmance of the death penalty. After careful review in considering both the crime and the defendant, we find no material difference between this case and the companion case of Ruffin v. State, supra, insofar as the imposition of the death penalty is concerned. Jose High's sentence to death for kidnapping with bodily injury in which the victim was murdered and murder is not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. See Potts v. State, supra.

Judgment affirmed in part, reversed in part, and vacated and remanded in part. All the Justices concur, except that as to divisions 6, 8, 12, 11, 11, P. J. concurs in the judgment only. Gregory, J., not participating.

APPENDIX

1. Ruffin v. State, 243 Ga. 95 (252 SE2d 472) (1979)
2. Fair v. State, 245 Ga. 868 (268 SE2d 316) (1980)
3. Patrick v. State, 245 Ga. 417 (265 SE2d 553) (1980)
4. Dampier v. State, 245 Ga. 427 (265 SE2d 565) (1980)
   Addendum - 245 Ga. 882 (268 SE2d 349) (1980)